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A DIGEST

OF

The Laws of England

RESPECTING

REAL PROPERTY.

VOL. VI.

A

DIGEST

OF

The Laws of England

RESPECTING

REAL PROPERTY.

By WILLIAM CRUISE,
OF LINCOLN'S INN, ESQ. BARRISTER AT LAW.

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A DIGEST

OF

The Laws of England

RESPECTING

REAL PROPERTY.

VOL. VI.

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ERRATA.

VOL. I. Introduction, Page xiii. Tit. 26. for *Dignitaries* read *Dignities*.

VOL. II. Page 404, Line 14, for *probably* read *Property*.
405, Line 27, after *that* insert *it*.

VOL. III. Page 264, Line 17, for *Willis* read *Willes*.
426, Line 18, after *before* insert *Admittance*.

VOL. IV. Page 301, Line 9, for *Releasee* read *Release*.

A DIGEST

OF

The Laws of England

RESPECTING

REAL PROPERTY.

TITLE XXXVIII.

DEVISE.

CHAP. I.

Of the Origin and Nature of Devises.

CHAP. II.

Who may devise, and to whom.

CHAP. III.

What may be devised.

CHAP. IV.

Of Devises of Copyholds.

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CHAP. VI.

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CHAP. XX.

Of other matters relating to Executory Devises.

CHAP. I.

Of the Origin and Nature of Devises.

1. *Origin of Devises.*
6. *Statutes of Wills.*
10. *Nature of a Devise under these Statutes.*
12. *Of a Codicil.*
13. *No particular Form necessary.*
16. *A Devise transfers the Freehold.*
19. *And imports a Consideration.*
20. *Devises are void against Creditors.*
23. *Devisees are entitled to Aid in Equity.*
25. *A Will of Lands need not be proved in the Ecclesiastical Court.*
28. *But may be registered.*

Section 1.

THE last mode of conveying real property is by devise, or disposition contained in a person's last will and testament, to take place at the death of the devisor. The word devise appears to be derived from divide, and originally meant any kind of division or distribution of lands; but it was used to denote a will so early as in the time of Glanville, who says, *Potest enim quilibet homo, majoribus debitis non involutus, de rebus suis, in infirmitate sua, rationabilem devisam facere.* Origin of Devises. Lib. 7. c. 5.

1 Inst. 111 *b.* *n.* 1. 2 Inst. 7. Wright's Ten. 173.

2. It is generally agreed that the power of devising lands existed in the time of the Saxons *; but, upon the establishment of the Normans, it was taken away; because it was inconsistent with the principles of the feudal law: and although many of the restraints on alienation by deed were removed before Glanville wrote, yet the power of devising lands was not allowed for a long time after; partly from an apprehension of imposition on persons in their last moments; and partly on account of the want of that public notoriety, which the common law required in every transfer of real property. And therefore it is said, in the same chapter of Glanville from which the passage in the preceding section is taken, which relates to personal property only; that no person could dispose of his lands by will. *De hæreditate vero nihil in ultima voluntate disponere potest.*

Lib. 7. c. 1.

Lit. § 167. Rob. Gav. 234.

3. The power of devising, however, continued as to socage lands, situated in cities and boroughs; and also as to all lands in Kent, which were held by the custom of gavelkind: and as the ancient Saxon laws are supposed to have remained unaltered in Kent, this is an additional proof that lands were devisable in the time of the Saxons.

Tit. 11. c. 2. § 36.

4. We have seen that a power of devising lands was indirectly acquired by means of the invention of uses; and this power appears not only to have been allowed by the Crown and the legislature, but even, in some particular instances, to have received their sanction; for by the statutes 7 Hen. VII. c. 3. and 14 & 15 Hen. VIII. c. 14., persons who were in the

* The will of King Alfred is preserved in a register of the Abbey of Newminster, at Winchester, which is still extant; and has been lately published at the Clarendon press, Oxford.

King's service in the wars, were allowed to alien their lands for the performance of their wills, without licence, or fine for alienation.

5. The practice of devising the use of lands carried the power to dispose of real property much farther than was consistent with the nature of tenures. It tended to deprive the lords of their wardships, profits of marriages, and reliefs; and the King of his primer seisin, livery, and fines for alienation; which constituted a considerable part of the ancient revenue of the Crown. This, together with many other inconveniences that flowed from the doctrine of uses, was removed by the statute 27 Hen. VIII. c. 10., which uniting the legal seisin of the land to the use, effectually took away the power of devising. Tit. 11. c. 3.

6. The inconveniences which attended this restraint on the disposition of lands by devise, induced the legislature, in a few years after, to give every one a power to devise a certain portion of his land. An act was made, 32 Hen. VIII. c. 1., intituled, "The act of wills, wards, and primer seisins, &c." reciting that persons of landed property could not conveniently maintain hospitality, nor provide for their families, the education of their children, or payment of their debts, out of their goods and moveables; it therefore enacts, that all and every person and persons, having manors, lands, tenements, or hereditaments, may give and dispose of them, as well by last will and testament in writing, as by any act executed in their lifetime, in the following manner: if they held in socage, they might devise the whole; and if they held of the King, or of any other person, by knight service, they might devise two parts, or as much as should amount to the yearly value of two parts in Statutes of Wills.

three, in certainty, and by special divisions, so as it might be known.

7. By the statute 34 & 35 Hen. VIII. c. 5. intituled, "The bill concerning the explanation of wills," reciting that several doubts, questions, and ambiguities had arisen upon the statute 32 Hen. VIII., it was enacted, (§ 3.) that the words, estate of inheritance, used in that statute, should mean only an estate in fee simple; and it was further enacted, (§ 4.) "that all and singular person and persons having a sole estate or interest in fee simple, or seised in fee simple in coparcenary, or in common in fee simple, of and in any manors, lands, tenements, rents, or other hereditaments, in possession, reversion, remainder, or of rents or services incident to any reversion or remainder, shall have full and free liberty, power, and authority to give, dispose, will, or devise, to any person or persons (except bodies politic and corporate), by his last will and testament in writing, as much as in him of right is or shall be, all his said manors, lands, tenements, rents, and hereditaments, or any of them, or any rents, common, or other profits or commodities out of or to be perceived of the same, or out of any parcel thereof, at his own free will and pleasure."

8. With respect to lands held by knight service, either of the King or of a subject, no more than two-thirds thereof could be devised under the authority of the above statutes: but in consequence of the abolition of military tenures, and the conversion of knight service into common socage, the operation of these statutes now extends to all estates in fee simple.

1 Inst. 111 *b*. *n*. 4. 4 Rep. 35 *a*.

9. The statutes of wills being in the affirmative, were held not to take away the custom of devising;

and formerly it was of importance, in many cases, to resort to the custom of devising, as being most beneficial for the devisee. But now the two powers being assimilated, and made for the most part commensurate, it can seldom happen that it should be necessary to call the power by custom in aid; though it is possible; as where the custom enables an infant of fourteen, or a feme covert, to devise lands.

Nature of a Devise under these Statutes.

10. The idea of a devise of land was evidently taken from the *testament* of the Roman law, which was at all times allowed in England, with respect to personal property. But the power of devising lands being given by positive statutes, is only co-extensive with the words of these statutes. A devise is therefore founded on different principles, and governed by different rules, from a testament; which is only an instrument to convey personal property: for a devise is considered, not so much in the nature of a testament, as of a conveyance, declaring the uses to which the land shall be subject, after the death of the devisor.

Cowp. 305

11. The word *testament*, in the Roman law, was applied only to dispositions which contained the institution or appointment of an heir, who was to take all the property of the testator: and the Roman lawyers observe, that a testament might be made in five words—*Quinque verbis potest quis facere testamentum, ut dicat, Lucius Titius mihi hæres esto.* All other dispositions, in which there was no heir named, were called *codicils*, or donations in contemplation of death. But the English law does not admit of these distinctions: for a devise does not necessarily imply the appointment of a general heir, or a disposition of all the testator's lands; but only of those which

are particularly mentioned; and the residue descends to the heir, as if no such devise had been made.

Tit. 32. c. 16. § 23.

12. It has been already stated, that wills, made in execution of powers, are in fact appointments of uses; but still that they have all the essential qualities of wills or devises of land.

Of a Codicil.

13. A codicil, of which the name only is taken from the Roman law, is a supplement to a devise, or an addition made by a testator to his will, and of which it is considered as a part; being intended to alter or explain, or to make some addition to, or subtraction from, the former dispositions of the testator.

14. A person may therefore make several wills of different parts of his lands, or of distinct estates or interests therein; and he may also make several codicils, altering, explaining, adding to, or subtracting from, what was before devised; or devising a part of his estate not disposed of by any former will or codicil: and the law will annex such codicil or codicils to his will, and consider the whole as one instrument.

No particular Form necessary.

15. The law has not prescribed any particular form in which a will or codicil must be made; so that any writing by which the intention of a person appears, to give or dispose of his lands after his decease, though in the form of a deed, will be considered as a good devise.

Hickson v. Witham, Finch R. 195. Green v. Proude, 1 Mod. 117.

16. C. Witham, by indenture made between him of the one part, and Orbel and Skin of the other part, declared his intention to raise portions for his children, and to pay his debts; and thereby settled his lands on Orbel and Skin, in trust to sell the same, &c., and made them executors, to the uses aforesaid;

and signed, sealed, published, and declared this to be his last will in the presence of several witnesses. The Court of Chancery declared this to be a good will.

Clymer v. Littler, 1 Black R. 345.

17. In a modern case, which will be stated hereafter, Lord Loughborough, Mr. J. Buller, and Mr. J. Wilson held that a deed poll, which was intended to operate after the death of the person who made it, and who had already published his will, to which it referred, should be considered as a codicil.

Habergham v. Vincent.

18. In the case of a devise of lands, the freehold is in the devisee before entry; and he may enter without the assent of the heir of the devisor, to whom nothing descends. If the heir of the devisor enters, the devisee may bring an ejectment against him, which, however, is his only remedy. And those to whom lands are given by devise are said to take in the nature of purchasers; though the bounty of the testator is the only consideration which is supposed in a will. But it is settled that a devisee may disagree and disclaim a devise, in which case nothing will vest in him.

A Devise transfers the Freehold. 1 Inst. 111 *a.* 1 Show. R. 71.

1 Inst. 240 *b.* Tit. 31. c. 2. § 18.

Crewe v. Dicken, Tit. 12. c. 4. § 35.

19. A devise imports a consideration in itself, and therefore there cannot be a resulting use on it; nor can it be averred to be to the use of any other but the devisee. It is for this reason that a devise of lands cannot be averred at law to be in bar of dower, jointure, or any other right or interest to which the devisee may be entitled. But in equity a devise is sometimes considered as a satisfaction. It should however be observed, that a will does not defeat a prior voluntary conveyance.

And imports a Consideration. Tit. 11. c. 4. § 55. Tit. 6. § 21.

Tit. 32. c. 27. § 48.

20. Soon after the statute of wills, it was found that the power of devising was attended with some very material inconveniences; for creditors by bond

Devises are void against Creditors.

or other specialty, which affected the heir, provided he had assets by descent, were defrauded of their securities; not having the same remedy against the devisee of their debtor. But by the statute 3 Will. & Mary, c. 14. it is enacted, (§ 2.) that all wills and testaments shall be deemed and taken, only as against creditor or creditors by bond or other specialty, in which the heirs are bound, their heirs, successors, executors, administrators, and assigns, to be fraudulent, and utterly void. By the 4th section, devises for payment of debts or children's portions, pursuant to a marriage agreement, are excepted.

infra, c. 16.

Treat. of Eq. B. 1. c. 4. § 14. 4 Ves. 550. Lingard v. Derby, 1 Bro. R. 311.

21. Mr. Fonblanque has observed, that in consequence of this last clause, bond and other specialty creditors, whose demands do in their nature affect the land, are still liable to be prejudiced by the right of their debtor to devise his real estate; for if he devise, subject to the payment of his debts, his simple contract creditors will be entitled to be paid *pari passu* with such bond or other specialty creditors; because, in conscience, their debts are to be equally favoured, being equally due.

Kinaston v. Clarke, Tit. 17. § 29.

22. It has been already stated to have been determined, that an estate in reversion is within this statute; and that a devise of the reversion by the heir of the obligor, is also within the act; and that in such a case the lands are liable.

Devisees are entitled to Aid in Equity.

Newcastle v. Pelham, 3 Bro. Parl. Ca. 460.

23. Persons who claim lands under a will, having the law on their side, are entitled, as against the heir of the devisor, to the assistance of a court of equity, for a discovery of the deeds and writings relating to the devised estate; and to have them delivered up, as following the lands. This course of proceeding is founded on the highest reason; for

otherwise all wills of land might be disappointed, and the heir at law, by gaining possession, and getting the deeds into his custody, unless compellable to discover and produce them, in order to make out the title of the devisee, might defend himself at law, by setting up prior incumbrances, and by that means prevent a legal trial of the validity of the will, and totally frustrate the intention of the testator.

24. A devisee is also entitled, in equity, to have any incumbrance which may be on the devised estate paid off for his benefit. Vide Tit. 15. c. 4. § 4.

25. A will of lands need not be proved in the Ecclesiastical Court; although it is usually done, because most wills of land contain also a disposition of personal estate; for the probate of such a will cannot be given in evidence, because all the proceedings, so far as they relate to freehold interests in land, are *coram non judice;* as the Ecclesiastical Courts have no power to authenticate such instruments. A Will of Lands need not be proved in the Ecclesiastical Court. Cro. Car. 296. 346.

26. It is therefore frequently necessary to produce the original will, and for that purpose to take it out of the Ecclesiastical Court, in which it has been proved: in such a case, an application must be made to the Court of Chancery, for an order to deliver the will. 1 Atk. 627. 4 Bro. R. 476.

27. These rules do not apply to wills of chattels real, or terms of years; for as they vest in executors, all wills affecting them must be proved in the proper Ecclesiastical Court.

28. By the statute 2 & 3 Ann. c. 4. § 20. it is enacted, that all memorials of wills that shall be registered, of any lands in the west riding of the county of York, within the space of six months after But may be registered. Vide Tit. 32, c. 27.

the death of every respective devisor, dying in England or Wales, or within the space of three years after the death of every devisor dying abroad, shall be as valid and effectual against subsequent purchasers, as if the same had been registered immediately after the death of such devisor.

29. By the next section it is provided, that in case the devisees, by reason of the contesting of such wills, shall be disabled to exhibit a memorial for the registry thereof within the times before limited; then and in such case the registry of the memorial within the space of six months next after the attainment of the will, or a probate thereof, or removal of the impediment, shall be a sufficient registry within the meaning of the act.

30. By the statute 6 Ann. c. 35. § 14. the same provision is made for registering wills of lands in the east riding of Yorkshire, as in the above act; and by the next section it is provided, that in case the devisee, by reason of the contesting such will, or other inevitable difficulty, without his wilful neglect or default, shall be disabled to exhibit a memorial for the registry thereof within the times limited, and that a memorial shall be entered in the office of such contest or other impediment, within six months after the decease of the devisor who shall die within the kingdom of Great Britain, or within three years after the decease of such person who shall die beyond sea; then and in such case the registry of the memorial of such will within six months after the attainment of such will, or a probate thereof, or removal of the impediment, shall be a sufficient registry within the meaning of this act.

31. By the statute 7 Ann. c. 20. § 8. the same provision is made for registering wills of lands in the

county of Middlesex, as in the stat. 2 & 3 Ann.; and it is provided, (§ 9.) that if the devisee, by reason of the concealment or suppression, or contesting such will, or other inevitable difficulty, shall be disabled to exhibit a memorial for the registry thereof within the times limited, and that a memorial shall be entered in the office of such contest or other impediment, within two years after the death of such devisor, dying in Great Britain, or four years after the death of such person, dying beyond sea; then and in such case the registry of the memorial of such will within six months after its attainment, or a probate thereof, or removal of the impediment, shall be a sufficient registry within the meaning of the act: provided that in case of any concealment or suppression of any will or devise, any purchaser shall not be disturbed or defeated in his purchase, unless the will be actually registered within five years after the death of the devisor.

32. By the statute 8 Geo. II. c. 6. § 15. the same provision is made for registering wills of lands in the north riding of Yorkshire, as in the stat. 2 & 3 Ann.; and it is provided, (§ 16.) that in case the devisee, by reason of the contesting such will, or other inevitable difficulty, shall be disabled to exhibit a memorial within the times limited, and that a memorial shall be entered in the office of such contest or impediment, within six months after the decease of such devisor, dying in Great Britain, or three years after the death of such person, dying beyond sea; then and in such case the registry of the memorial of such will within six months after its attainment, or a probate thereof, or removal of the impediment, shall be a sufficient registry within the meaning of the act: and it is provided by the next

section, that in case of any concealment or suppression of any will or devise, no purchaser or purchasers for valuable consideration shall be defeated or disturbed in his or their purchase, nor any judgement or statute creditor shall be defeated of their debts, by any title made or devised by such will, unless the will be actually registered within three years after the death of the devisor.

TITLE XXXVIII.

DEVISE.

CHAP. II.

Who may devise, and to whom.

2. *Who may devise.*
3. *The King.*
5. *The Queen Consort.*
6. *Who are disabled from devising.*
7. *Infants.*
10. *Married Women.*
12. *Idiots and Persons of non-sane memory.*
13. *Removal of Disabilities does not establish a Will.*
18. *To whom Lands may be devised.*
19. *Unborn Infants.*
21. *Married Women.*
22. *Aliens.*
23. *Bastards.*
24. *Persons uncertain.*
25. *Bodies Politic cannot be Devisees.*
26. *Devisees must submit to the whole Will.*

Section 1.

TO the validity of every devise it is necessary that there be a devisor, capable of disposing, and a devisee or devisees, capable of taking the lands devised.

Who may devise.

2. With respect to the persons who are capable of devising, all those who have a power of disposing of their real estates, by any conveyance *inter vivos*, may dispose of them by will.

The King.

3. In 16 Rich. II. the Bishops, Lords, and Commons assented, in full Parliament, that the King, his heirs and successors, might lawfully make their testaments, and that execution might be done of the same, whereof some doubt was made before. This

Rot. Parl. vol. 3. 301. 4 Inst. 335.

act only authorized our Kings to dispose of their personal property; for it is stated, in Brooke's Abridgement, to have been laid down by Fortescue, in 35 Hen. VI., that the King could not devise land by his testament: but it appears from the Rolls of Parliament that the Kings of England were in the practice of conveying lands to trustees, to the use of their last wills.

Tit. Prerog. pl. 5.

39 & 40 G. 3. c. 88. § 4.

4. It has however been enacted by a modern statute, that his Majesty, his heirs and successors, may, by will, devise any manors, messuages, lands, tenements, and hereditaments, purchased by, or which shall come to, his Majesty, his heirs or successors, out of any monies issued and applied for the use of his or their privy purse, or with any other monies not appropriated to any public service; or any manors, &c. which have come to his Majesty, or shall come to him, his heirs or successors, by gift, devise, or descent, or otherwise, from any of his or their ancestors, or any other person or persons, not being Kings or Queens of this realm.

The Queen Consort.

5. The same statute, § 8, after reciting, that by the law of England the Queen consort, wife of the King, was capable of taking, granting, or disposing of property, as if she were a *feme sole;* but that doubts might arise, how far this capacity of granting or disposing of property extended; and especially whether, during the life of the King her husband, it included the power of devising and bequeathing by last will and testament; and reciting that his Majesty was desirous that her Majesty, during the King's life, should have full power, by her last will and testament, to dispose of any manors, messuages, lands, tenements, and hereditaments purchased by or in trust for her Majesty, or which should thereafter vest in

her Majesty, or in any person in trust for her, as fully as if she were sole and unmarried; it is enacted, that it shall be lawful for her Majesty, by her last will and testament in writing, attested by three or more witnesses, to dispose of such estates as she is authorized by that statute to grant by deed; and, by the 9th section, the like power is given to all future Queens. Vide Tit. 32. c. 2. § 8.

6. With respect to the persons who are disabled from devising lands, the statute of wills mentions four personal disqualifications to the power of devising. Who are disabled from devising.

7. The first of these is infancy; and therefore persons under the age of twenty-one years are incapable of devising their lands. Infants.

8. But if there be a local custom, that lands and tenements within a certain district, shall be devisable by all persons of the age of fifteen, or upwards; a devise of such lands, by an infant of fifteen, will be good. Perk. § 504.

9. An infant may devise the guardianship of his child, by virtue of the statute 12 Cha. II. c. 24.; and it has been contended, that such a disposition will draw after it the land, as incident to the guardianship; but this point has not been determined. Bedell v. Constable, Vaugh. 177.

10. Married women are also expressly disabled by the statute of wills from devising their lands; but married women are now frequently enabled to dispose of lands by wills, operating as appointments under powers. Married Women. Vide Tit. 32. c. 13.

11. A woman whose husband has abjured the realm, or who has been banished for life by act of parliament, may in all things act as a *feme sole*; and may therefore make a will of her lands. 1 Inst. 133 *a*. Portland v. Prodger. 2 Vern. 104.

12. The two other disabilities which are expressly mentioned in the statute of wills are, idiotcy, and non-sane memory. But it should be observed, that Idiots and Persons of nonsane memory.

every person who makes a will, is presumed to be of sound understanding, till the contrary is proved; so that the *onus probandi* lies on the other side.

Removal of Disabilities does not establish a Will. 11 Mod. 123.

13. Where a devisor is under any of the disabilities before mentioned, at the time when the will is made, it is absolutely void, although the disability be removed before the death of the devisor; for the parties must be capable of devising at the time when the will is made.

Hawe v. Burton, Comb. 84.

14. A man of full age declared, in the presence of several witnesses, that his will, made when he was under age, should stand; it was however adjudged that the will was void, on account of the infancy of the devisor at the time of the first publication. But

1 Salk. 238.

if the will had been republished, after the devisor attained his full age, it would have been good.

11 Mod. 157.

15. It is the same where a married woman makes a will, and afterwards becomes a widow; for the will was void, in its inception.

2 Vern. 475.

16. Thus it is said by Lord Keeper Wright, that if a will is made by a feme covert of lands of inheritance to J. S., and the baron dies, and then the wife dies, though her intention is plain, and though after the decease of the baron, when she became *sui juris*, she might have devised the lands to J. S., or by a republication have made the former will good, yet it was not relievable in equity.

11 Mod. 157.

17. It is laid down by Lord Ch. J. Trevor, that if a man be *non compos*, and not in his right mind, at the time of making his will, though he afterwards, never so long before his death, becomes a man of understanding, and sound judgement and memory, yet the will is void, and can by no means be made good, because he wanted the disposing power at the time of making the will.

18. All natural persons who are *in esse* at the time when a will is made, and who are capable of acquiring lands by purchase, such as infants, &c., may be devisees. To whom Lands may be devised.

19. It was formerly much doubted whether an infant in *ventre matris*, could be a devisee in a will; but it is now settled that such a devise is good. Unborn Infants.

20. A person devised to his brother Henry Clarke and his assigns, for his life, remainder to the use and behoof of all and every such child or children of his said brother as should be living at the time of his decease. Henry Clarke died leaving several children, and his wife pregnant, who was delivered seven months after of a daughter. The question was, whether the posthumous child took any thing under this devise. Doe v. Clarke, 2 Hen. Black. 399.

Lord Ch. J. Eyre said, it was plain, on the words of the will, the testator meant that all the children whom his brother should leave behind him should be benefited. But, independent of this intention, he held that an infant in *ventre matris*, who by the course and order of nature was then living, came clearly within the description of children living at the time of his decease. Judgement was given accordingly.

21. A married woman is not thereby disabled from being a devisee in a will: and although she cannot take any thing from her husband directly by deed; yet neither the custom of devising, nor the statute of wills, disqualify a wife from being the devisee of her husband; because the devise does not take effect till the death of the husband, by which the marriage is dissolved, and they cease to be one person. Married Women. Lit. § 168. 1 Inst. 112 *a.*

22. Lord Hardwicke has said, there is no rule of law, or upon the statute of wills, to prevent an alien Aliens. 2 Ves. 362.

from taking by devise, although it is a doubtful matter for whose benefit he is enabled to take.

Bastards. 1 Inst. 3 *b.* Metham v. Devon. 1. P Wms. 529. vide infra, c. 10.

23. A bastard may be a devisee, but he must have gained a name by reputation; and therefore a devise to a bastard in *ventre matris* is void, for he cannot have a name by reputation till he is born.

Persons uncertain. Bate v. Norton, T. Raym. 82.

24. A devise to a person uncertain, as to such of the daughters of A. as shall marry a person of the name of Norton, is good; and a devise to a person not in existence at the time when the will is made, as to the first son of A. B., who has then no son, is good by way of remainder, or executory devise.

Bodies Politic cannot be Devisees.

25. Bodies politic and corporate are expressly disabled by the stat. 34 & 35 Hen. VIII. c. 5. § 14. from taking by devise, in conformity to the spirit of the laws against mortmain; it was however held, in consequence of the stat. 43 Eliz. c. 4., that a devise to a corporation, for a charitable use, was valid, as operating in the nature of an appointment; but now the stat. 9 Geo. II. c. 36. has rendered all devises for charitable uses void, except such as shall be made to the two universities, and to the colleges of Eton, Winchester, and Westminster. The King being both a body politic and corporate, is incapable of taking by devise.

Tit. 32. c. 2. § 44.

Devisee must submit to the whole Will. Forrest R. 82.

26. It is laid down by Lord Talbot, that when a person takes upon him to devise what he has no power over, upon a supposition that his devise will be acquiesced under; the Court of Chancery will compel the devisee, if he will take advantage of the devise, to take entirely, but not partially under it; there being a tacit condition annexed to all devises of this nature, that the devisee do not disturb the disposition which the devisor has made.

27. A. having two daughters, B. and C., devised lands whereof he was tenant in fee simple to B., and lands of which he was only tenant in tail to C. It was held, that if B. claimed a share of the entailed lands, she must relinquish her claim to the fee simple lands devised to her: for the testator having disposed of his whole estate amongst his children, what he gave them was upon an implied condition, that they should release to each other.

Noys v. Mordaunt, 2 Vern. 581.

Bor v. Bor, 3 Bro. Parl. Ca. 167. Doe v. Cavendish, 4 Term Rep. 741.

28. A person, by articles previous to his marriage, agreed to settle lands to the use of himself and his wife for their lives, with remainder to the use of the heirs of their bodies. He afterwards made a settlement, which was not pursuant to the articles; and on the marriage of his son, settled other lands on him in the usual manner, and levied a fine of the lands comprised in the articles, to the use of himself in fee. By his will he devised part of those lands to his daughters, and the rest of his estates to his grandson. Lord Talbot held, that the grandson, being entitled to the lands comprised in the articles, should be put to his election, whether he would take under the will, or the articles.

Streatfield v. Streatfield, Forrest, 176.

29. Where a will is void, as a devise of land, either from the incapacity of the devisor, or from its not being properly executed, and is good as to personal estate; the heir may take a legacy under it without relinquishing his right by descent; because, as to the land, there is in fact no disposition of it, and consequently no election.

30. In the case of Hearle v. Greenbank, the daughter, by a will made when she was only nineteen years old, gave a legacy to her heir at law, and disposed of the real estate to another person; the question was, whether, as the will was void as to the land, and good.

Tit. 32. c. 13. § 32.

as to the legacy, the heir should have the land, and also the legacy, or be obliged to make his election.

Lord Hardwicke declared his opinion, that the heir was not obliged to make his election, for the will was void; and when the obligation arose from the insufficiency of the execution, or invalidity of the will, there was no case where the legatee was obliged to make an election, for there was no will of the land. A man devises a legacy to his heir at law, and his land to another; the will is not well executed according to the statute of frauds for the real estate; the court would not oblige the heir at law, upon accepting the legacy, to give up the land.

31. But where the heir becomes entitled to a real estate by descent, in consequence of its having been purchased after the execution of his father's will, by which interests are bequeathed to him, he cannot take both, but must make his election.

infra, c. 3.

32. P. Thelusson devised several real estates to trustees, upon trust to accumulate the rents to a certain period; and directed, that in case he should enter into any contracts for the purchase of lands, and die before the conveyance thereof, such contracts should be carried into execution, and the conveyance be to his trustees, upon the trusts of his will. He also devised certain interests to his son. After the execution of this will, the testator contracted for the purchase of some real estates, and died without republishing his will. The heir claimed the lands contracted for, and also the interests given him by the will.

Thelusson v. Woodford, 13 Vesey, 209.

Lord Erskine.—"The prayer of the bill filed by the heir at law, with reference to this point, is, in effect, that the personal estate of the testator shall be applied to the completion of these contracts, directed by

the will to be carried into execution for the benefit of the heir; and that he, in opposition to the will, may take as heir those estates so contracted for; and the trustees may stand seised to his use, instead of the uses of the will. I give the judgement which I find myself bound to give with some reluctance, considering this will as dictated by feelings not altogether consistent with convenience. But this appears to me to be a case of election. The jurisdiction exercised by this Court, compelling election, may be thus described. A person shall not claim an interest under an instrument, without giving full effect to that instrument, as far as he can. If therefore a testator, intending to dispose of his property, and making all his arrangements under the impression that he has the power to dispose of all that is the subject of his will, mixes in his disposition property that belongs to another person, or property as to which another person has a right to defeat his disposition, giving to that person an interest by his will; that person shall not be permitted to defeat the disposition where it is in his power, and yet take under the will: the reason is the implied condition that he shall not take both; and the consequence follows, that there must be an election: for though the mistake of the testator cannot affect the property of another person, yet that person shall not take the testator's property, unless in the manner intended by the testator.

Vide infra, c. 20.

"This is the proposition. But it has been said, that when a testator by his will attempts to give that which is not his property, but which he supposes to be his, forming his different dispositions upon that mistake, *non constat* what he would have done, had he been aware of the true state of the circumstances. The best answer to that was given by Lord Alvanley

2 Ves. Jun. 367. in the case of Whistler v. Webster—That no man shall claim any benefit under a will, without conforming, as far as he is able, and giving effect to every thing contained in it, whereby any disposition is made, showing an intention that such a thing shall take place; without reference to the circumstances, whether the testator had any knowledge of the extent of his power, or not. Nothing can be more dangerous than to speculate upon what he would have done, if he had known one thing or another. It is enough to say he had such intention; and the Court will not speculate upon what he would have done in the different cases put. If the instrument is such as to indicate what the intention was, the only question is, did he intend the property to go in such a manner; not whether he had power to do so, and would have done it, had he known he could not, without a condition imposed upon another person. Whether he thought he had the right; or, knowing the extent of his authority, intended by an arbitrary execution of power to exceed it; no person taking under the will shall disappoint it.

"In every case of election there must be an intention to dispose of that, over which that person has no power of disposition; that is the circumstance that creates election. The testator, with this peculiar object, the application of his personal estate to the acquisition of great landed property, was not aware of the distinction between real and personal estate; and therefore conceived, that, under this direction of his will as to his future contracts for purchases, his trustees would be legally seised according to the uses of his will. As he had not the power to make that disposition, the heir takes those estates that cannot pass by the will;

but the testator, not being aware of that, gives considerable interests to his heir; but gives those interests under the conception that the whole property and arrangement were subject to his control; and upon that ground the principle of election must prevail.

"In Noys v. Mordaunt the testator imagined he had power over the estate which was in settlement, and the Lord Keeper put the decision upon the implied condition. That case was followed by Streatfield v. Streatfield, and several cases down to Sheddon v. Goodrich. The difficulty upon a plain simple principle occurred in the case of Hearle v. Greenbank. But I do not apprehend that this case will be embarrassed by that decision. Lord Hardwicke held that the act of the infant had no effect; that there was no disposition as to the real estate; and therefore a case of election did not arise. ante, § 27. ante, § 28. 8 Ves. 481. ante, § 30.

"This is the case of a man having a clear right to dispose by will, both of his real and personal estate, but his disposition fails as to these real estates, by his ignorance of the distinction, that a will of a subsequent date was necessary. There is therefore, as in the case of Hearle v. Greenbank, no will that can touch these real estates. As to the case of a devise with two witnesses only, the intention is as plain as in Noys v. Mordaunt: why then should not the Court say in the former case, the intention is clear, but cannot as to the real estate have legal effect, from the omission of a third witness by mistake: as in the other case, the devisor attempts, through mistake, to devise an estate which is in settlement, or belongs to another person. The opinion of Lord Hardwicke I take to be this; a devise of real estate is considered as a matter of so much solemnity and importance, that the law will not accept proof of the act, without

the evidence of three witnesses. If not so proved, it is nothing; it cannot receive notice. The intention cannot be represented; for it cannot be presumed, and there is no evidence: the will not being executed with the solemnity prescribed by the law, as to real estate, cannot be read: the Court cannot see any devise of real estate; and therefore, as the estate does not appear to be devised away from the heir, no act appearing to be done, as in this case the act does appear to be done by Mr. Thelusson, the heir cannot in that case be put to election.

"The case of Hearle v. Greenbank stands upon the same ground; an infant under the statute not having a right to dispose of real estate. The Court cannot look at the will. It is, from the incapacity of the person who frames it, considered as no instrument.

32 Hen. 8.

"These are the only instances in which the principle has been limited. It cannot be argued that it does not reach an heir at law. Lord Hardwicke would not put the case of an heir at law, by way of illustration, if the heir could not under any circumstances be put to election. The principle of election is plain and intelligible; that if a person being about to dispose of his own property, includes in his disposition, either from mistake or not, property of another, an implication arises, that the benefit under that will shall be taken upon the terms of giving effect to the whole disposition. Mr. Thelusson's heir takes these estates, as if his father had not made a will; but my opinion is, that he cannot also take what is given to him by the will. He must therefore elect."

1 Dow. 249.

Upon an appeal to the House of Lords, the order was confirmed.

32. Mr. Vesey, in a note to this case, observes, that the case of a devise to the heir of an estate which he would have by descent, if no will was made, and to another person of an estate of which the heir is seised in his own right, is put by Sir S. Romilly as said to be a case of election; and that Mr. Sugden had found a precise decision of the point accordingly against the heir. Anon. Gilb. Eq. Rep. 15. And in that instance it might be observed, the heir took, not under the devise, but by his better title, descent. The devisor however devising the estate to him, must be conceived to be aware of his power to devise it away; and the condition was accordingly implied. 9 Ves. 347.

TITLE XXXVIII.

DEVISE.

CHAP. III.

What may be devised.

1. *Estates in Fee Simple.*
4. *Estates for Lives.*
5. *Chattels Real.*
7. *Trust Estates.*
8. *Lands contracted for.*
13. *Mortgages.*
14. *Equities of Redemption.*
15. *Advowsons.*
17. *Rents.*
18. *Tithes.*
19. *Franchises.*
22. *Contingent Estates and Interests.*
27. *The Devisor must be seised or entitled.*
31. *And must continue seised or entitled.*
32. *Exceptions.*
33. *Tenancies escheated.*
34. *Copyholds purchased by the Lord.*
36. *And Terms for Years.*
37. *A Right of Entry is not devisable.*
39. *Nor a Joint Tenancy.*

Section 1.

Estates in Fee Simple.

THE proper subject of a devise is real property; and the words used in the statute of wills are, "manors, lands, tenements, rents, or other hereditaments, in possession, reversion, or remainder;" which extend to every species of real property, whether corporeal or incorporeal.

3 Buls. 184.

2. Not only estates in fee simple absolute, but also determinable fees, and base fees, are devisable under these statutes; the word fee simple being taken in its most extensive sense.

3. By the words of the statute 34 & 35 Hen. VIII. § 4. all persons seised in fee simple, in coparcenary,

or in common, may devise the estates which they hold in this manner. And all persons seised in fee simple may devise any rents, commons, or other profits, out of, or to be perceived of the same, or out of any parcel thereof.

Estates for Lives.

4. The statute 34 & 35 Hen. VIII. only extends to estates in fee simple, and therefore did not enable persons to devise estates *pur auter vie.* But it was enacted by the statute 29 Cha. II. c. 3. § 12. that any estate *pur auter vie* shall be devisable by will in writing.

Gawin v. Ramtes, Cro. Eliz. 804.

Chattels Real.

5. As to chattels real, or terms for years, they might always have been disposed of by testament, because they were only considered as personal estate. But where a person acquires a term as executor, he cannot devise it; for immediately on his death it is to the use of the first testator, and his executors have it as executors of the first testator, and to his use.

Bransby v. Grantham, Plowd. 525.

Wentw. c. 2 & 19.

6. Whenever a term for years is devised, the consent of the executor is necessary to complete the title of the devisee; and if a term be devised to A. for life, remainder to B., the assent of the executor to the devise to A. will operate as an assent to the devise over to B. and vest an interest in him accordingly.

10 Rep. 47 *b.*

Trust Estates.

7. As uses were the medium through which lands were originally devisable; so trust estates, which in fact are uses not executed by the statute, are now devisable; but where a person has only an equitable interest in lands, his devise of them amounts to no more than a direction to those who have the legal estate in trust for him, to convey it according to the devise.

2 P. Wms. 258.

Lands contracted for.

8. Where articles are entered into for the purchase of lands, and before a conveyance of the legal estate is made, the purchaser devises the estates, and dies;

1 Cha. Ca. 39. 9 Mod. 78.

such devise will be held good in equity: for although according to the strict of rules of law, the devisor has not lands within the statute of wills, till a conveyance of the legal estate is executed; yet, from the execution of the articles, the vendor is considered to be seised only in trust for the purchaser, who in equity is deemed the real owner of the lands; and therefore is allowed to dispose of them.

9. Where an agreement for the purchase of land is not to be carried into execution till a future day, and previous to such day the purchaser makes his will, yet the lands so agreed for pass by such will.

Greenhill v. Greenhill, Prec. in Cha. 320.

10. By articles dated in April 1706, it was agreed between the vendors, and the agent of the purchaser, that the possession of the lands, agreed to be purchased, should be delivered at the Michaelmas following, and proper conveyances to be executed; and the agent covenanted that the purchase money should be paid, when possession was delivered. In June following the purchaser made his will; and the question was, whether these lands passed by it.

Lord Cowper decreed that they did, and upon an appeal to Lord Keeper Harcourt, it was argued by Sir Joseph Jekyll and Mr. Howe, that this decree ought to be reversed. They took a distinction between an agreement for the immediate purchase of lands, and such an agreement for the future purchase thereof, as this was; they agreed, that if the articles had been for the present purchase of the lands, the vendor would immediately have become a trustee for the purchaser; and then a devise of them would have been good in equity: but here the possession was not to be delivered till Michaelmas following, nor was any money to be paid before that time; and

then the purchaser had no power to devise them sooner.

On the other side it was said, in support of the decree, that these lands were bound immediately from the execution of the articles; that the possession not being to be delivered till a future time, made no difference in equity. That if the purchaser had died before Michaelmas, the equity would have descended to the heir; and he might have brought a bill against the executors to compel the payment of the purchase money out of the personal estate.

Lord Keeper Harcourt said he saw no reason to vary the decree: he thought that such future interest was devisable, as well as if it had been in possession: that the lands and money were mutually bound by the articles; and affirmed the decree.

11. Even a parol agreement for the purchase of lands, which is admitted, so as to be binding on the parties, notwithstanding the statute of frauds, will vest such an interest in the purchaser, as he may devise by his will. Tit. 32. c. 3.

12. In the year 1748 a parol agreement was made between Mr. Brown, as agent for Mrs. Hughes, and Messrs. Potter and Westley, as agents for the archbishop of Canterbury, for the purchase of an estate in the Isle of Wight. The plan and particulars of the estate were delivered to Westley, and on the 7th June 1744 the parties met; a price was fixed, and it was agreed by parol, that the purchase should be completed the Christmas following. In July 1744 the title deeds were delivered to Westley to abstract, and deliver to the purchaser's counsel, which was done in April 1745. The further proceeding was interrupted by a claim of one Huxley to part of the estate; a bill was filed, and it was referred to the Potter v. Potter, 1 Ves. 437.

Master to inquire into the contract, who reported, in February 1746, that it was a beneficial one: and the next day Westley received instructions from the archbishop to draw the conveyances, which he did, and which were approved of on behalf of the archbishop; on the 17th September 1746 they were carried to the archbishop, who returned them to be engrossed, and they were actually engrossed in his lifetime, but were not executed, as intended.

The archbishop had made his will in 1745, and on the 10th April 1747, long after this agreement, he made a codicil, ratifying and confirming his will; and the question was, whether the estate thus agreed for, should pass by his will and codicil.

The Master of the Rolls (Sir J. Strange) said, one circumstance was wanting; the reducing the agreement into writing, according to the statute of frauds; which if done in 1744, the estate would certainly be considered as the archbishop's, in equity, from that time. But though an agreement was not reduced into writing, and signed by the party, yet it was well known that if confessed, or in part carried into execution, it would be binding on the parties, and here was the fullest admission thereof. And as the will was republished by the codicil, it would pass this estate.

Tit. 32. c. 3. Rose v. Cunninghame, 11 Ves. 550. Vide Longford v. Pitt, infra.

Mortgages.

13. If a mortgagee devises the lands mortgaged, before the condition is broken, it will be void; because a condition is not devisable. But an estate in mortgage may be devised after the condition is broken: and in such a case, if the devisee exhibits his bill against the mortgagor, to foreclose him, a decree will be made accordingly.

Tit. 15. c. 2. § 38, &c. Anon. 2 Cha. Ca. 8. How v. Vigueres, 1 Cha. Rep. 18.

Equities of Redemption.

14. An equity of redemption, being similar in some respects to a trust estate, has always been considered as devisable: and in 12 Cha. II. it was decreed by

Tit. 15. c. 3.

the Court of Chancery, that where a person seised in fee, had mortgaged his estate, and afterwards devised it, the equity should go to the devisee, and not to the heir. Philips v. Hele, 1 Cha. Rep. 101.

15. An advowson appendant to a manor will of course pass by a devise of the manor; an advowson in gross being an hereditament, is also devisable under the statute of wills; and the next or any number of presentations may also be devised; in which case the devisee may either present himself, or any other person. Advowsons. Tit. 21. Cleer v. Peacock, Cro. Eliz. 359. Law v. Epis. Lincoln. 2 Black R. 1240.

16. Where the incumbent of a church had the inheritance of the advowson in him, and devised the next presentation, it was held good; for though the will had no effect till the death of the devisor, yet it had an inception in his lifetime, and that made it good. Penchyn v. Harris, Cro. Ja. 371.

17. A rent charge is devisable by the words of the statute 34 & 35 Hen. VIII.; but it was formerly doubted whether a rent charge *in esse*, issuing out of gavelkind lands, and having commenced within time of memory, was within the custom of devising; and it was not settled to be so, till the time of Lord Hale. Rents. 1 Inst. 111. *a.* n. 5. 1 Mod. 112. Rob. Gav. 79.

As to rent service, it of course followed the nature of the reversion or seigniory to which it was incident: nor was there any doubt as to the custom extending to other rents, if they had existed immemorially. Idem.

18. Tithes impropriate in lay hands are comprehended under the general word hereditaments, in the statute of wills, and are therefore devisable. Tithes. Tit. 22. § 76.

19. Lord Coke says, that franchises which are not of an annual yearly value cannot be devised: and therefore if the King grants *bona et catalla felonum*, waifs, estrays, or any other kind of franchises which Franchises.

are not of an annual value, they are not devisabl
But franchises of a certain value, and not restraine
to the person of the grantee and his heirs, may l
devised.

20. Franchises, though not of a certain value, w
however pass by devise, as appurtenant to oth
things of an annual value.

3 Rep. 32 *b.* 21. Thus in Butler and Baker's case it is said, if
man seised of a manor, to which a court-leet, wa
estray, or any other hereditament which is not
any annual value, is appendant or appurtenan
devises the manor with the appurtenances, these sh
pass as incidents to the manor.

Contingent Estates and Interests. Fearne Cont. Rem. 537. 22. Contingent remainders, and all other continge
estates and interests in land, are now held to be devi
able; though formerly an opinion prevailed th
they did not pass by a will made previous to the
vesting.

Selwin v. Selwin, 1 Black R. 222. 251. 2 Burr, 1131. 23. John Selwin being tenant for life, with r
mainder to his son John in tail; the father and s
joined in a deed of bargain and sale, dated 20th Ap
1751, to make a tenant to the *præcipe*, for the pu
pose of suffering a common recovery; the uses
which were declared to be to the father for life, r
mainder to the son in fee. Trinity term began th
year on the 7th of June, and on the 8th, John t
son made his will, whereby he disposed of all his r
estates; in the same term a writ of entry was su
out, returnable *quinden. trin.* which was the 17
June, and the recovery was completed the sa
term. John Selwin the testator died soon after t
Tit. 36. c. 3. return of the writ of entry; and the question w
whether the lands comprized in the recovery pass
by the will, it having been made before the retu
day of the writ of entry.

It was contended that the testator had only a future executory use, at the time of making his will, not a present use; for the statute could not draw the estate to the use, till the possibility, that is, the completion of the recovery, had actually happened; and that this future executory use was not devisable.

The Court of King's Bench certified their opinion to the Court of Chancery, that the lands passed by the will; and Lord Mansfield, in a subsequent case, is reported to have said, that if the practice of the Court allowed him to give his reasons, he was prepared to have shown, with the concurrence of his brethren, that all contingent, springing, and executory uses, where the person who was to take was certain, so that the same might be descendible, were devisable. 1 Black. R. 606.

24. The doctrine laid down by Lord Mansfield, has been fully confirmed in the two following cases.

Sir James Grubb devised all his real estates, in trust for his son James; and if he should die without issue, under age, then that all his estates should go to Cochran his heirs and assigns. Cochran devised all the estates whereof he was seised in possession, remainder, or reversion, to the plaintiff, and died in the lifetime of James Grubb the son; who afterwards died under age; and without issue. Moor v. Hawkins, 1 H. Black. R. 33.

On a bill brought by the devisee of Cochran, a question was made whether the possibility given to Cochran was devisable.

Lord Northington.—"I never had any doubts, since I was twenty-five years old, but that these contingent interests were devisable, notwithstanding some old authorities to the contrary. I sent the question however into the King's Bench, in the case of Selwin v. Selwin, for the satisfaction of the parties; and the certificate of the Judges implies, I think,

that they agreed with me in this opinion." Upon which the Solicitor General De Grey and Mr. Skynner waved all further argument on the other side; and Lord Northington added—"This argument is properly withdrawn, as the point is settled, and ought not to be shaken. It is a liberal and right determination."

Roe v. Jones, 1 Hen. Black. Rep. 30.

25. A testator devised his dwelling-house, &c. to his brother T. L. till his (T. L.'s) youngest son I., or any other of his younger sons, should attain the age of 21 years. And in case he should have no younger son who should attain that age, but only one son that should attain it, then till such only son should attain that age. And when his said nephew I. or any other of the younger sons of the said T. L. should attain the age of 21 years, then he gave his said dwelling-house, &c. unto his said nephew I., or unto such other son as for the time being should be a younger son of his said brother T. L., and should first attain his age of 21 years, and to the heirs and assigns of such younger son for ever. The testator left his said brother his heir at law, and T. and the said I. the sons, and only issue of his said brother. I. died under 21 years of age, and afterwards T., in the lifetime of his father T. L., made his will, and devised "all his worldly estate, of what nature or kind soever, whether in possession, remainder, or reversion, that he should die seised or possessed of, interested in or entitled to, invested in, or should belong to him at his decease, wheresoever or howsoever, in any manner or wise," unto his wife in fee.

Upon this case three questions arose. First, whether there was a vested interest in T.: secondly, whether, if it was contingent, it was devisable: and thirdly, whether it passed by the will.

Lord Loughborough said, the discussion of the first question was unnecessary; for taking it to be a springing contingent executory use in T., they were all of opinion that it was devisable, and passed by his will.

26. Upon a writ of error in the Court of King's Bench, the decision of the Court of Common Pleas was confirmed: and Lord Kenyon observed, that the statute for enabling persons *having* any manors, lands, &c. to devise, must mean, having an interest in the lands. He distinguished between such a contingent interest, and a *mere possibility*, like that which an heir has from his ancestor; which was nothing more than the *hope* of a succession, and was not subject to disposition; and he hoped that the point would be considered to be fully at rest.

3 Term Rep. 88. Jones v. Perry.

Ashurst, J. said, the plain meaning of the statute was, that every person who had a valuable interest in lands, should have the power of disposing of it by will.

Buller, J. observed, that if it was such an interest as was descendible, it seemed strange to say, it was not also devisable; that they must both be governed by the same principle; and that it was a sound distinction which had been taken by the Chief Justice, between a bare possibility, and a possibility accompanied with an interest.

Grose, J. remarked, that the 4th section of 34 & 35. Hen. VIII. c. 5. which was explanatory of 32 Hen. VIII. c. 1., declared that all persons having a sole estate or interest in lands, &c. might devise; which did not include a bare possibility or hope of succession, but a possibility accompanied with an interest.

Perry v. Philips, 1 Ves. Jun. 251.

27. When the feudal doctrine of non-alienation began to subside, and some persons were allowed to dispose of their lands by will, a devise was considered

The Devisor must be seised or entitled.

Cowp. 305. to be in the nature of an appointment to uses. The courts of law therefore held, that a devise affecting lands could operate only on such real estates as the testator had at the time of executing his will, and not upon any lands acquired afterwards.

28. The statutes of wills adopt the same principle, the words being, all and every person and persons having manors, &c., or having a sole estate, &c.; from which it follows that the devisor must have the estate at the time of making his will, for he cannot devise
3 Rep. 30 b. what he has not in him, then. And in Butler and Baker's case, the Judges commenting on the word *having*, in the statutes of wills, say,—If it be asked, *quis potest legare*; the makers of the act answer, every person *having* manors, &c.; not every person generally.

Brunker v. Cook, 11 Mod. 121. 1 Salk. 237. 29. A person devised all such sums of money, lands, tenements, goods, chattels, and estates whatsoever, wherewith at the time of his decease he should be possessed or invested, to his wife. Nine years after, the testator received a sum of money in right of his wife, which he laid out in the purchase of an estate in Kent, of the nature of gavelkind, and died without having republished his will. The heir at law of the testator entered, and his widow brought an ejectment to recover the possession. The jury found a special verdict, stating the above facts; and that by the custom of gavelkind any tenant, being seised of lands in fee, might devise the same by will in writing.

The Court was of opinion that the lands did not pass: and Lord Holt said, the lands purchased after the execution of the will did not pass by it, because the law of England was plain as to this point, by all the precedents; and the law was the same of lands devised by custom, as of lands devised by statute:

and whenever a will was pleaded, it was always said that the testator was seised in fee, and being so seised, made his will; which plainly showed, that it was absolutely necessary he should be seised in fee at the time of making his will.

Upon a writ of error in the House of Lords, this judgment was affirmed. 3 Bro. Parl. Ca. 19.

30. It has been stated that lands contracted for may be devised: there must, however, be express articles, or a positive agreement, binding within the statute of frauds, for the purchase of an estate, entered into and completed before the execution of the will; otherwise such estate will not pass by it.

Mr. Longford entered into articles with Governor Pitt, for the sale of lands in Cornwall. Long before the execution of the articles, Governor Pitt made his will; and the question was, whether the lands comprised in the articles passed by the will; and it was held that they did not. Longford v. Pitt, 2 P. Wms. 629.

31. The devisor must not only be actually seised, or well entitled to the lands, at the time of making his will; but must continue to be seised or entitled to them, till the time of his death: for in the case of a devise of a legal estate, the will cannot take effect unless the devisor dies seised. So that if a person devises his lands, and is afterwards disseised, and dies before entry, the devise is void. But if the devisor re-enters, the devise becomes again valid; according to the opinion of Lord Holt; because when a man is disseised, and re-enters, the disseisin is purged, and the disseisee is considered as never having been out of possession. And must continue seised or entitled. 11 Mod. 128. Holt's Rep. 748. Bro. Ab. tit. Devise, pl. 15. 4 Burr. R. 1961. 8 Ves. 282.

Where the devise is of an estate in reversion, it must not be divested and turned to a right, of which an account will be given in a subsequent part of this chapter. vide infra, c. 6.

Exceptions.

32. There are a few cases in which it has been held that a devise should operate upon property which the devisor had not at the time of making his will.

Tenancies escheated. 1 Salk. 238. 11 Mod. 129.

33. Thus where a person devised his manor of A., and subsequent to the execution of his will, but before his decease, a tenancy escheated; it was admitted that it would pass to the devisee, as being part of the manor.

Copyholds purchased by the Lord.

34. It has also been determined, that where a person seised of a manor made his will, and afterwards purchased a copyhold held of the manor, the land passed by the will.

Roe v. Wegg, 6 Term R. 708.

35. Mr. Hale devised the manor of King's Walden with the appurtenances, and all his messuages, lands, tenements, and hereditaments in the parish of King's Walden, to W. Hale, esq. Mr. Hale, after making his will, purchased a copyhold, parcel of the said manor, and held of himself, as lord of the manor, and the same was surrendered to the use of Mr. Hale and his heirs.

It was determined that this copyhold passed by the will of Mr. Hale; because, in the eye of the law, the copyholders of the manor are only tenants at will to the lord, who is seised of the freehold and inheritance of the whole. Now, when the lord in this case made his will, it operated upon the whole manor, including the demesnes and services; and when the copyhold was purchased by the lord, it was still part of the manor, and passed by a devise of the manor.

And Terms for Years. 1 P. Wms. 575. 3 Atk. 176.

36. A term for years, purchased after the execution of the will, passes by it, because it is only a chattel real; and the will in this instance operates as a testament, and not as a devise, either by custom or by the statutes of wills.

37. It has been stated in a former title, that where there is a tenant for life, with a vested remainder, or a reversion immediately expectant thereon, in another person, and such tenant for life levies a fine, it divests the remainder or reversion, and turns it to a right, leaving only in the remainder-man or reversioner a mere right of entry, which is not devisable. A Right of Entry is not devisable.

38. Thus in the case of Goodright v. Forrester, Lord Ellenborough said, the second question was, whether a right of entry was devisable, and the Court was of opinion that it was not devisable, for such right was certainly not assignable by the common law, nor did it fall within the words of the statute 32 Hen. VIII. c. 1., which were, "having manors, lands, tenements, or hereditaments;" nor of the statute 34 & 35 Hen. VIII. c. 5. § 4. which were, "having a sole estate or interest in fee simple of and in any manors, &c. in possession, reversion, or remainder." In Corbet's case, 1 Rep. 85 *b.* "For the construction of wills, this rule was taken by the justices in their arguments, that such an estate, which cannot by the rules of the common law be conveyed, by act executed in his life, by advice of counsel learned in the law, such estate cannot be devised by the will of a man who is intended by law to be *inops consilii.*" From whence it might be inferred, that out of that interest, in which, by act executed in a man's life, it was not possible to create any estate, no estate could be created by his will. And in Butler and Baker's case, 3 Rep. 32 *a.* it is said, "Without question, that which a man cannot dispose of by any act in his life, shall not be taken for any of his manors, &c. whereof he may devise two parts, by authority given him by the statute." And in Lord Mountjoy's case, Godb. 17. it was laid down, "that the statute of wills, 32 Hen. VIII. that it shall be Tit. 35.

lawful, &c. to devise two parts, &c., respects only such things as are devisable; but a right of entry was not devisable, and therefore, according to the terms of the statute, and the authority of that case, was not devisable. For these reasons the Court was of opinion that there must be judgement for the defendant. And whatever mischief or hardship might attend the decision of this case, or might be expected to arise from the application of the same rule to other cases, it was an inconvenience which could only be remedied by positive law; and the propriety of applying such a remedy, whereby the same rights of entry and action which belong to the heir, might be extended to the devisee, was a question particularly fit for the consideration of the legislature *.

Nor a Joint Tenancy. Lit. § 287. 1 Inst. 185 *a*. Tit. 18. c. 2.

39. Littleton says, if there be two joint tenants in fee of lands devisable by custom, and one of them devises his share, it is void; because no devise can take effect till after the death of the devisor; and by that event the lands become immediately vested in the other joint tenant, by survivorship.

3 Rep. 25. Poph. 87.

40. In conformity to this principle, the statute 34 & 35 Hen. VIII. only enables persons having a sole estate in fee simple, or seised in fee simple in coparcenary or in common, to devise, which excludes estates held in joint tenancy. And in Butler and Baker's case, in 35 Eliz. it was laid down, that the law only considers what estate the devisor had at the time of making his will, without regard to any subsequent event; from which it follows, and has been settled, that a devise by a joint tenant, who afterwards

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* A writ of error was brought in the Exchequer Chamber, but judgement was given on another point, 1 Taunton's Rep. 578.

severs the joint tenancy is void; because the devisor was joint tenant when he made his will.

41. Richard Gilbert and Frances Sophia Gilbert were seised of the premises in question, as joint tenants in fee. Richard Gilbert, on the 20th January 1754, made his will, and thereby devised in these words: "*Imprimis*, I give and bequeath all my part, right, title, and interest, which I have in an estate jointly with my sister Frances Sophia Gilbert, to my wife Jane." Afterwards, by indentures of lease and release, Richard Gilbert and his sister made a partition, and severed the joint tenancy; and the estate in question was conveyed to Richard in fee. The question was, whether the will was good as to this estate.

Swift v. Roberts, 3 Burr. 1488. 1 Black. R. 476.

The Court was clearly and unanimously of opinion, that a will made by a joint tenant, during the continuance of the jointure, was not a good will, even as to a share of his estate, under the statute of wills, notwithstanding a subsequent severance of the joint tenancy, by a partition, unless there was a republication of it after the partition.

TITLE XXXVIII.

DEVISE.

CHAP. IV.

Of Devises of Copyholds.

1. *Copyholds devisable by Surrenders to Uses.*
5. *Nature of such Surrenders.*
17. *Who may devise.*
19. *What may be devised.*
20. *A Surrender of this kind bars an Entail.*
22. *An equitable Interest is devisable without a Surrender.*
27. *But an equitable Entail is not barred by a Devise.*
31. *Where a Surrender will be supplied.*
32. *For Creditors.*
35. *For a Wife.*
36. *For younger Children.*
38. *A Surrender not supplied unless the Intent is apparent.*
41. *The Heir sometimes put to his Election.*

Section 1.

Copyholds devisable by Surrender to Uses.

AS the statutes of wills only mention lands held by knight-service, and in socage, they do not extend to copyhold estates; but a power of devising this kind of property has long been indirectly exercised, by an application of the doctrine of uses, similar to that which was anciently resorted to, in respect to freehold lands. For this purpose the copyholder surrenders his estate to the use of his last will, and then disposes of it by his will, which operates as a declaration of the uses of the surrender, and not as a devise under the statutes of wills.

Gilb.Ten.322. 1 Inst. 111 *b.* n. 1.

Holder v. Preston, infra, c. 16.

2. By the general custom of all manors, every copyholder has a right to surrender his estate to the use of

his will; and in a modern case it was held, that if there was a custom in a manor, that copyholds should not be surrendered to the use of a will, such a custom would be deemed void. Pike v. White. 3 Bro. Rep. 286. 15 Ves. 403.

3. A surrender to the use of a will must be presented: but by special custom such presentment may be made at the next court, after the death of the surrenderor, though it be not the next after the surrender made; and it is said that it would be good without any special custom. Com. Dig. Cop. F. 10.

4. A surrender to the use of a will, cannot be made before the admittance of the devisor, for till then he has no estate or interest in the copyhold. Doe v. Tofield 11 East, 246.

5. Where a copyholder surrenders to the use of his will, the estate remains in the copyholder, and does not vest in the lord; for all the design of the surrender is, that the surrenderor may dispose of it by his will; not to vest an interest in any one, or to give away the power of disposing of it. Nature of such Surrenders. 4 Rep. 23 *a*. Gilb. Ten. 195.

6. Thus where a copyholder surrendered to the use of himself for life, then to his son for life, then to the use of his will; the son died, and the father surrendered to the use of another in fee. It was held by Anderson and Walmsley, that the copyholder might dispose of it in his lifetime, notwithstanding the surrender to the use of his will. Fitch v. Hockley, Cro. Eliz. 442.

7. A copyholder having surrendered to the use of his will, and afterwards surrendering to new particular uses, with reversion to himself in fee; it was held that he was in of the old use, and might devise the reversion, without any admittance or fresh surrender to the use of his will. Thrustout v. Cunningham, 2 Black. R. 1046.

8. Where a copyholder makes a surrender by way of mortgage, he continues in possession of the legal estate till the mortgagee is admitted, and cannot

therefore devise, without a surrender to the use of his will.

Floyd v. Aldridge, cited 5 East, 137.

9. A person mortgaged a copyhold in fee, and surrendered it to the mortgagee; but the latter was not admitted. The money was not paid at the time. The mortgagor afterwards made his will, and devised the estate, without a surrender to the use of his will, and died. The devisee brought his bill to redeem, making the heir a party.

Sir T. Sewell, M. R. dismissed the bill, saying that the plaintiff had no interest in the copyhold; if the mortgagee had not the legal estate, there was no equity of redemption. The legal estate remained in the surrenderor, till admittance of the surrenderee. After the first surrender, before admittance, he is tenant to the lord, and may therefore surrender to the use of his will. A second cannot prejudice a first surrender; when the first surrenderee came in, he would be admitted. A mortgagee was seldom admitted; the mortgage was discharged by an entry on the court rolls; all remained in the mortgagor; no fine, no change of tenant, &c. As he might have made a surrender to the use of his will, without prejudice to the mortgagee, he ought to have done it: the estate could not pass at law, and equity would not assist a volunteer against the heir.

Kenebell v. Scrafton, 8. Ves. Jun. 30.

Doe v. Wrcot, 5 East, 132.

The same point was determined by the Court of King's Bench in Easter term, 1804.

Semaine v. ——— 1 Bulst. 200.

10. It was held in 10 Jac. that where a copyholder surrenders his estate to the use of his will, and afterwards makes a will; the lands do not pass by the will, but by the surrender; for the will is only declaratory of the uses of the surrender.

Tit. 10. c. 5. § 4. Roe v. Hicks.

11. In the case of a surrender by a copyholder to the use of his will, and a devise thereof, the devisee

has no title till he is admitted; but if a devise is to two persons, and one of them is admitted according to the purport of the will, this shall enure to both. Co.Cop. § 35.

12. The devisor must have the copyhold at the time of making his will; otherwise it will not pass by it.

13. Thomas Warde made his will, and reciting that he was seised of a copyhold estate (whereas in fact he was not), devised all his real estate, &c. He afterwards purchased a copyhold estate, and surrendered it to such uses as he by his last will and testament should appoint; and afterwards died without making any other will. Warde v. Warde, Amb. 299.

Lord Hardwicke held that the copyhold did not pass by the will. 1st. Because the surrender was to a future appointment. 2d. Because the words of the will did not extend to an after-purchased copyhold; but only to such of which he was seised at the time of making the will.

14. It is said by Lord Mansfield to have been determined in the case of Harris v. Cutler, B. R. Trin. 10 Geo. III. that copyhold lands, purchased after a will, do not pass by it. 1 Term Rep. 438. note. Vide Heylin. v. Heylin, infra, c. 7.

15. It was resolved in a modern case, that where a copyholder, having an estate *pur auter vie*, surrendered all his estates in possession, remainder, or reversion, to the use of his will, and afterwards acquired the fee by descent, such fee did not pass by the will. Doe v. Cowling, 6 Term Rep. 63.

16. By the statute 55 Geo. III. c. 192. it is enacted, that in all cases where, by the custom of any manor in England or Ireland, any copyhold tenant of such manor may, by his or her will, dispose of or appoint his or her copyhold tenements, the same having been surrendered to such uses as should be declared by such will, every disposition or charge,

made or to be made by any such will, by any person
12 July 1815. who shall die after the passing of this act, of any such copyhold tenements, or of any right, title, or interest in or to the same, shall be as valid and effectual to all intents and purposes, although no surrender shall have been made to the use of the will of such person, as the same would have been if a surrender had been made to the use of such will.

Who may devise.

17. All those who are capable of devising freehold estates may also devise copyholds. But a married woman cannot devise a copyhold. And where a woman surrendered to the use of her will, and afterwards married; it was held that the surrender was suspended during the marriage, and that a devise by the wife of the copyhold so surrendered was void; notwithstanding that, by articles previous to the marriage, her husband agreed that she should have power to devise.

George v. — Amb. 627.

18. Ann Thornbury, widow, surrendered a copyhold to the use of her will; soon after she married; but previous thereto she entered into articles, reciting the surrender, and that the intended husband agreed that she should have power to settle her estate, or to devise the same, during coverture, without his contradiction. The wife made her will, reciting her power under the articles; and the question was, whether it was good.

Lord Ch. J. Willes delivered the opinion of the Court, and laid down these two propositions: 1st, That a feme covert could not make a will of lands. 2d, That the surrender by her when sole, became void; or at least was suspended by the marriage. As to the first, it was contrary to the 34 & 35 Hen. VIII. that a feme covert should make a will; for by that statute, wills made by feme coverts were void in

w. But it was argued that the consent of the usband, by the articles, gave her the power of devis-g, though by law she could not otherwise do it; and ny cases were cited to prove this doctrine, but ey were all cases of wills of personal estate, made y virtue of such agreement; and there could be no oubt but the husband might give her a power to ispose of her personal estate, because by the mar-age he had the sole property in, and power over it; t it was otherwise of lands of inheritance, belong-g to the wife; and he could not give her such a ower to make a will, in prejudice of her heir at law. udgement that the will was void.

19. An estate in remainder or reversion in a copy-old may be devised, as well as an estate in possession; ut such estate must be duly surrendered to the use f the will. What may be devised.

Lord Coke says, if two joint tenants be of copyhold 1 Inst. 59 *b.*
nds in fee, and the one out of court, according to he custom, surrender his part to the use of his will, nd devises it to a stranger in fee, and dies, and at he next court the surrender is presented; by the urrender and presentment the jointure was severed, nd the devisee ought to be admitted to the moiety of he land; for now by relation the estate of the land as bound by the surrender. Porter v. Porter, Cro. Ja. 100. S. P.

20. It has been stated in the preceding title, that n many manors, a surrender to a stranger and his eirs was sufficient to bar an entail. This doctrine as been extended to surrenders made to the use of he surrenderor's will. And Lord Hardwicke has aid, where a copyholder seised of an estate tail urrenders to the use of his will, if entails by the ustom of the manor are not barrable by recovery or ine, but by surrender, in such case the surrender to A Surrender of this kind bars an Entail. Tit. 37. c. 2. Moore v. Moore, Amb. 279. 2 Ves. 601.

the use of his will, not only effectuates the will, but operates as a bar to the entail.

Carr v. Singer, 2 Ves. 604. C. B. 1750.

21. A person being tenant in tail of a copyhold estate, there being a custom for entailing copyholds, surrendered into the hands of the lord, to such uses as he should by any deed or will limit or appoint. He made his will, devising the customary premises in question to one of the defendants. Upon the rolls of the manor there was found one single instance of a surrender to bar an estate tail; but it did not appear what enjoyment was under the surrender: and no instance was found on the rolls of a recovery suffered to bar estates tail.

Birch, J. said, the question was, whether the estate tail was barred by the surrender, and the devise in pursuance thereof; as it was admitted there was a custom in the manor for entailing copyholds, it must be admitted there was some method to bar such entails, or else there would be a perpetuity, which the law abhorred; and he thought the surrender was a good bar to the entail.

Burnet, J. said, he concurred in that opinion. The whole of the case came to this:—Here was a manor in which custom had established the entailing of copyhold, and no method of barring; for one instance so modern would not weigh with him. The opinion that where there is no recovery by custom, a common surrender will do, was mentioned by Lord Cowper in 2 Vern. 583.; but though this was an opinion only, his next determination, 2 Vern. 702., was delivered as a judge, upon the very point in judgement; his opinion therefore was, that the same rule must hold, that a surrender of a copyhold would be a sufficient bar of the entail, where there was no recovery by custom to bar it.

Lord Ch. J. Willes said, he was the less concerned at differing in opinion in this case, because he thought the opinion of his brethren attended with less inconvenience than his. He agreed that an estate tail in copyhold was not created by custom, but custom co-operating with the statute; and that if it might be created by custom, some way to bar it must be found out, to prevent a perpetuity. He agreed also that a surrender would bar such estates, if there was a custom for it, according to the express words of Co. Lit. 60. And Lord Coke would never have said, that if an estate may be created by custom, a surrender by custom will bar it; if it was then established that a surrender without a custom would bar. His opinion therefore was, that there must be a custom to make a surrender good. If there was no other way to bar, he admitted a surrender would, without a custom, from necessity, to avoid a perpetuity; but if there was a way of barring, there was an end of that question. He thought a recovery without custom would bar; and if so, there was no occasion for a surrender to bar. As a recovery might be suffered in the lord's court, he could not think a surrender would bar: but he was satisfied, that unless this came to be the established opinion, great inconvenience would arise, and hoped his brother's opinion would determine it; but he could not think the law was so. The occasion of this method was from the ignorance of stewards, who knew not how to suffer a recovery, and therefore chose to do it by surrender.

That as his brother Abney, before his death, declared himself of opinion with his two brothers, judgement must be in support of the surrender.

22. Where the legal estate in a copyhold is outstanding, the person entitled to the equitable interest

An equitable Interest is

devisable without a Surrender.

may devise it without a surrender; for otherwise it could not be disposed of by will, as a person who has not the legal estate cannot make a surrender.

Davie v. Beardsham, 1 Cha. Ca. 39. 2 Freem. 157. 1 Term R. 601.

23. A person agreed for the purchase of copyhold lands, which were surrendered out of court to his use; but before admittance he died, having made his will after the contract, and thereby devised the copyholds.

It was declared by the Court to be clear that the copyholds so agreed for passed by the will; for the purchaser had an equity to recover the land, and the vendor stood trusted for him, or as he should appoint, till a conveyance executed.

Tit. 37. c. 1. § 7.

Car v. Ellison, 3 Atk. 73.

24. The Solicitor General submitted, that a devise of a copyhold estate, without a surrender, where the devisor had only the equitable interest, and the legal in trustees, was sufficient to pass the copyhold.

Lord Hardwicke declared his opinion, that the trust of these copyholds would pass, without a surrender to the uses of the will. There had been several cases so determined, but particularly Tuffnell v. Page. Because the surrender must be by the person who had the legal estate; and when there was no legal estate in the party who had the beneficial interest, it might pass by a will, as well as other lands. But in the case of a descent, the person so taking cannot devise without a surrender.

infra, c. 5. Allen v. Poulton, 1 Ves. 121.

Doe v. Vernon, 7 East, 8.

25. Thomas Earl of Strafford surrendered certain copyhold estates to the use of his will; and devised them to his only son William in tail, remainder to his three daughters, of whom Lady Harriet Vernon was one, in fee. Lady Harriet made her will in 1779, by which she devised all her real estates to her second son, and died in 1786. William Earl of Strafford survived her, and died without issue, in 1791;

having been admitted. Lady Harriet did not surrender her estate in reversion to the use of her will; and the question was, whether it passed by it.

It was contended on behalf of the devisee,—1st, That the legal estate in a copyhold surrendered to the use of a will, remained in the surrenderor, and on his death descended to his heir, till admittance of some person, having relation to that surrender. 2d, That the interest taken by the party named as devisee was, till admittance, an equitable interest only; and that such was the interest which Lady Harriet had as devisee in remainder, Earl William never having been admitted. 3d, That Lady Harriet might devise such her equitable interest, without any surrender. The Court of King's Bench held, that the devisee of Lady Harriet, though admitted, could not recover against her heir at law, who had also been admitted, in ejectment. If he had any title, it was in equity.

26. It was ruled by Lord Talbot, that where a copyholder has mortgaged his copyhold, and the mortgagee is admitted; the mortgagor, not having the legal estate of the copyhold in him, has no estate that he can surrender; and therefore may devise the copyhold premises without any surrender.

King v. King, 3 P. Wms. 359.

Macnamara v. Jones, 1 Bro. R. 481. S. P.

27. An opinion formerly prevailed, that a devise alone would bar the entail of a trust estate in a copyhold, without a surrender; which was probably adopted on the authority of the following case.

But an equitable Entail is not barred by a Devise.

28. A. was tenant in tail of the trust of a copyhold, with remainder to J. S., and requested the trustees to surrender to him in tail; which they refusing, he brought a bill to compel them; and they put in their answers. Then A. died; but, pending the suit, he went to the lord's court and desired to be permitted to surrender, which was refused, because the legal

Otway v. Hudson, 2 Vern. 583.

estate was in the trustees; upon which A. made his will, and devised the premises to his wife.

Lord Cowper decreed the estate to go according to the will, there having been no *laches* in the testator: and he having devised the estate to the uses and purposes in his will, his Lordship conceived that was sufficient to bar the entail of a trust.

29. The decision in the above case appears to have been founded on the circumstance, that the person entitled to the entailed trust estate, had done every thing in his power to procure the legal estate; and therefore does not establish any general principle: and it is now understood, that an equitable estate tail, in a copyhold, must be barred in the same manner as a legal one.

Rose v. Lowe, 1 Hen. Black. 461.

30. Thus in a modern case, where it was contended by the counsel, that the equitable entail of copyholds might be barred by a mere devise; Lord Loughborough said—"Now, though it is true that the devise of an equity in a copyhold requires no surrender, yet that is where the testator has a devisable estate: the entail must first be barred; the party must have done some antecedent act, to enable him to devise. Here no such thing was done, and the will of T. W. H. did not operate long; there was no length of possession against the entail, on which to presume a surrender."

Where a Surrender will be supplied. Tit. 37. c. 1. § 105.

31. It has been stated in the preceding title, that the Court of Chancery will supply the surrender of a copyhold, in favour of creditors, wife, and children; and therefore if a person devises a copyhold for the benefit of persons of this kind, without surrendering to the use of his will, a court of equity will supply the defect.

The principle upon which the Court goes is, that whenever a man having power over an estate, whether ownership or not, in discharge of moral or natural obligations, shows an intention to execute such power, the Court will operate upon the conscience of the heir, to make him perfect this intention. 3 Bro. R. 230.

32. In the case of creditors, the Court will only supply a surrender where the other estates, which are liable to the payment of the debts, are not sufficient. For Creditors.

33. A person devised all his real estates to trustees for payment of his debts; and having freehold and copyhold, he neglected to surrender the copyhold to the use of his will. Upon an application to the Court of Chancery to supply a surrender of the copyhold, the Court directed that the master should first see whether there was enough, without the copyhold, for payment of debts. Drake v. Robinson, 1 P. Wms. 238. Rafter v. Stock, 1 Ab. Eq. 123. Bixbey v. Eley. 2 Bro. R. 325.

34. J. S. devised his real estate to be sold, for payment of debts, and certain pecuniary legacies; and, subject thereto, he devised his personal estate to his sister. Mallabar v. Mallabar, Ca. temp. Talbot, 78.

Lord Talbot refused to supply the defect of a surrender of the copyhold to the use of the will, against the heir, if the other estates sufficed to pay the debts, and dismissed the bill with costs as to this point; it having been confessed by the answer, that the testator's other estate, exclusive of the copyhold, was more than sufficient to pay the debts.

35. With respect to a wife, the Court, in supplying a surrender in her favour, respects the claim of the heir so far, that it will not interpose, if the heir would thereby be left unprovided for. But in a modern case the Court supplied a surrender in favour of a wife, against a distant heir, not provided for by For a Wife. Chapman v. Gibson, 3 Bro. R. 229.

the testator, though provided for *aliunde*. And in another case, the want of a surrender was supplied, in favour of a widow, against coheiresses, daughters of the devisor, and infant grand-daughters, by deceased daughters; the Chancellor being of opinion that the Court was to look only to the object, not to the circumstances of the parties; as whether the heir had a provision or not.

Hills v. Downton, 5 Ves. 557.

Fielding v. Winwood, 16 Ves. 90.

For younger Children.

36. With respect to younger children, there have been various opinions as to the circumstances under which the Court ought to interfere. It was formerly held that the Court would not supply a surrender in favour of younger children, where the heir would be thereby disinherited, or the younger children put in a better situation than the elder son. Afterwards it was laid down, that if the heir was provided for, though not by the testator, but *aliunde*, a surrender would be supplied in favour of the younger children; that the Court would not inquire into the *quantum* of the provision; and that a younger child being put in a better condition than the elder, was no objection.

Ross v. Ross, 1 Ab. Eq. 124.

Pike v. White, 3 Bro. R. 229.

Kettle v. Townsend, 1 Salk. 187.

37. A surrender will not be supplied in favour of a grandson. This was determined by the House of Lords in the reign of King William, contrary to the opinion of Lord Somers; whose decree was reversed. And though this determination of the Lords has been often objected to, yet it remains unshaken.

Perry v. Whitehead, 6 Ves. 544.

A Surrender not supplied unless the Intent is apparent.

38. Where there is a general devise, equally applicable to freehold and copyhold estates, and the testator has freehold estates to satisfy the words of the will, a court of equity will not supply a surrender; because the intent is not apparent to pass the copyholds.

39. A person seised of freehold and copyhold lands in Bereford, devised all his lands in Bereford to his wife and her heirs, without having surrendered the copyhold to the use of his will. The Court refused to supply the want of a surrender; because the words of the devise were satisfied by the freehold lands which passed by the will; and it was not certain that the testator intended to give the copyholds.

Ross v. Ross, 1 Ab. Eq. 124.

Bullock v. Bullock, 2 Ab. Eq. 231.

Challis v. Casborne, Prec. in Cha. 408.

40. A person having freehold and copyhold estates, devised all the rest and residue of his estate to his wife in fee; but did not surrender his copyholds to the use of his will. The widow insisted that equity ought to supply a surrender.

Byas v. Byas, 2 Ves. 164.

Sir J. Strange, M. R.—"There is no case where there is freehold as well as copyhold, and no notice taken of the copyhold in the will, that the Court has supplied the want of a surrender. Where copyhold lands are devised expressly to wife, children, or for creditors, nothing passes in point of law, for want of a surrender: however, a court of equity supplies it in these favourable circumstances, for the purposes of the will, but not for others; which is on the plain declaration of the testator, by expressly naming copyhold estates. If he had none but copyholds, *all my real estate* would have been sufficient to pass the copyhold, though no surrender had been made to the use of the will; but the general heir at law, or heir by particular custom, has always been so favoured, as not to be disinherited by implication, or inference from the particular wording of the will. The cases that have been, have turned on the construction of the words; upon the question of fact, whether the testator had what would answer the words of his will, on which the words would operate. Then the sur-

infra, c. 10.

render should not be supplied; as was the case before Lord Talbot in 1735, and the case of Bethlem Hospital, 10 June 1736: that *all my lands* would not pass copyhold lands not surrendered, if there were other lands to satisfy it. But if surrendered, that will explain the general words, and pass it; there is that which would come within the description of real estate. Then without surrender to the use of the will, or mention of copyhold, the Court will not take it from the heir.

Brooke v. Gurney, cited 5 Ves. 559. Judd v. Pratt, 15 Ves. 390.

41. Where the intention of a testator to pass his copyhold estates is clear, and the heir takes any benefit under the will, he must make his election, either to surrender the copyhold to the uses of the will, or to relinquish the benefit of such will.

The Heir sometimes put to his Election.

42. There was a devise of freehold and copyhold estates in strict settlement, with a remainder for life to the heir at law, after estates tail to the first and other sons of the first devisee. Lord Hardwicke held that the heir must give up that remote remainder, or surrender the copyhold to the use of the will.

Graves v. Forman, cited 3 Ves. 67. Frank v. Standish, cited 15 Ves. 390.

43. Sir Thomas Rumbold devised in these words: "All the residue of my estates, as well freehold as copyhold, the copyhold part thereof having been previously surrendered to the use of my will," upon several trusts, in favour of his wife and children. The only trust for his eldest son and heir was an annuity of 300 *l.* for life, remainder to his wife and children. The testator having never surrendered his copyhold to the use of his will, it was held a mistaken description, and that the copyhold did not pass; and the annuity being much more valuable, the heir was decreed to elect,

Rumbold v. Rumbold, 3 Ves. 65.

TITLE XXXVIII.

DEVISE.

CHAP. V.

Of the Solemnities necessary to a Devise.

1. *Statute of Frauds.*
2. *What is required by this Statute.*
3. *Writing.*
7. *Signing by the Testator.*
14. *Attestation by three Witnesses.*
19. *Who must see the whole Will.*
21. *And must attest in the Presence of the Testator.*
29. *But may attest at different Times.*
33. *Whether Wills and Codicils must be separately attested.*
42. *Who may be Witnesses.*
47. *Publication.*
50. *A Person cannot empower himself to give Lands by a Will not duly attested.*
52. *Wills charging Lands are within the Statute.*
53. *But not Wills or Codicils giving Legacies.*
58. *Wills of Trust Estates are within the Statute.*
60. *And of Mortgages and Equities of Redemption.*
62. *But not Wills of Copyholds.*
68. *Or of Terms for Years.*
70. *Except Terms attendant on the Inheritance.*
72. *Wills made abroad within the Statute.*
73. *The Execution of a Will may be proved in Chancery.*

SECTION 1.

Statute of Frauds.

AS the statutes of wills did not require any precise form or ceremony in a devise of lands, but only that it should be in writing; and as lands devisable by custom would pass by a will made by parol only, an infinite number of frauds were thereby committed. To remedy these, it was enacted by the statute 29 Cha. II. c. 8. § 5. "That all devises and bequests of any

ante, c. 3. § 4.

lands or tenements, devisable either by force of the statute of wills, or by this statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed, in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void, and of none effect."

What is required in this Statute.

2. In consequence of this statute the following circumstances are now absolutely necessary to the validity of a devise. 1°. That it be written. 2°. That it be signed by the party himself, or by some other in his presence, and by his express directions. 3°. That it be attested by three witnesses or four, in the presence of the testator.

Writing.

3. A devise of lands or tenements must be reduced into writing in the lifetime of the devisor; for it is not sufficient that it be put into writing after his death, being first declared by words only; for then it is but a nuncupative will.

4. It is not material upon what matter or stuff, whether paper or parchment, or in what language, whether English, Latin, French, &c., or in what kind of handwriting or character, a devise is written, so that it be fair and legible, and the meaning be sufficiently apparent. Neither is it material whether it be written at large, or by notes usual or unusual; or whether sums of money given be expressed at full length or in figures; provided it be free from all doubts and ambiguity.

Masters v. Masters, 1 P. Wms. 425.

5. Thus where a will, in which legacies charged on lands were written in figures, was scarcely legible; it was referred to a Master to examine and see what

never those legacies were; and he was directed to call to his assistance persons skilled in the art of writing.

6. A will may be written at several times, and on several sheets of paper, unconnected with each other; although the proper mode, where a will is written on several sheets of paper, is, to join them together by means of a piece of tape sealed. 1 Show. 66.

7. The next circumstance necessary to the validity of a devise of lands is, that it be signed by the testator, or by some other person in his presence, and by his direction. The latter part of this clause was inserted for the benefit of those persons, who, from sickness, or some other misfortune, should be incapable of writing their names, or making their marks. And where a will is written on several sheets of paper, it is the usual practice for the testator to sign each of them. Signing by the Testator.

8. *Signing* was chosen rather than sealing and delivery, which are the solemnities required in deeds; because seals, which were formerly a great mark of distinction in families, were much disused when this statute was made, and people sealed with any seal; so that signing, as used in the civil law, was preferred. Gilb. Rep. 261.

9. If the testator's name be written by himself in any part of the will, either at the beginning or the end, it will be considered as a sufficient signing within the statute.

10. A person wrote his will with his own hand, beginning thus, "I John Stanley make this my last will and testament," and put his seal, but did not subscribe his name to it. This was adjudged to be a good will; for being written by himself, and his name Lemayne v. Stanley, 3 Lev. 1.

in the will, it was a sufficient signing within the statute; which did not appoint where the will should be signed, at the top, bottom, or margin; and therefore a signing in any part was sufficient. And three of the judges were of opinion that the putting his seal had, of itself, been a sufficient signing within the statute of frauds; for *signum* was no more than a mark that it was his will.

11. The position laid down in the preceding case, that sealing a will is a sufficient signing within the statute of frauds, is very doubtful: for although Sir J. Strange reports, that in 13 Geo. I., on an issue directed out of Chancery, of *devisavit vel non*, the Chief Justice ruled, that sealing a will was a signing within the statute of frauds; yet in a subsequent case, 25 Geo. II. it was said by Lord Ch. B. Parker, Baron Clive, and Baron Smythe (*absente* Legge), that the opinion advanced in 3 Lev. 1., that sealing was a sufficient signing, was a strange doctrine; for if it were so, it would be very easy for a person to forge any man's will, by only forging the names of any three obscure persons, as there would be no occasion to forge the testator's name: and the Barons said, if the same should come in question again, they should not hold that sealing a will only, was a sufficient signing within the statute.

Warneford v. Warneford, 2 Str. 764.

Smith v. Evans, 1 Wils. R. 313.

2 Ves. 459. 1 Ves. Jun. 13. 17 id. 459.

12. The want of signing all the sheets of a will cannot be supplied; so that although the devisor should intend to sign, but becomes incapable of doing it by sickness, such a will cannot take effect.

13. A will was prepared and written on five sheets of paper, and a seal affixed to the last, and also the form and attestation written on it. The will was then read over to the testator in the presence of three witnesses, who afterwards subscribed, and the tes-

Right v. Price, Doug. 241.

tator set his mark to the two first sheets in their presence, and attempted to set it to the third; but being unable, from the weakness of his hand, he said, "I cannot do it, but it is my will." After this the three witnesses went away, being desired to come again. The testator died without setting his mark to the three last sheets.

Lord Mansfield said, the will was not duly executed; for when the testator signed the two first sheets, he had an intention of signing the other sheets, but was not able; he therefore did not mean the signature of the two first sheets as a signature of the whole will: there never was a signing of the whole. The Court, to be sure, would lean in support of a fair will, and not defeat it for a slip in form, where the meaning of the statute had been complied with; but here there was no room for presumption. Adjudged that the will was not duly executed.

Attestation by Three Witnesses.

14. The third circumstance required by the statute of frauds is, that a will shall be attested and subscribed, in the presence of the testator, by three or four credible witnesses; and the statute in this instance adopts the mode prescribed by the civil law, *in testamentis solemnibus*; not as laid down in Justinian's Institutes, but as reformed by the code in the Novels; and the evil meant to be remedied by the framers of the statute of frauds was, the secret and private manner in which wills were formerly executed.

Gilb. R. 261.

15. Where the testator owns his handwriting before the witnesses, it is sufficient, though they do not see him sign his name; and in the case of Stonehouse v. Evelyn, in proving a will disposing of real estates, the proof was full that the three subscribing witnesses did subscribe their names in the presence of the testatrix, but one of them said he did not see

3 P. Wms. 254.

the testatrix sign, but that she owned at the time when the witnesses subscribed that the name signed to the will was her own handwriting; which Sir Joseph Jekyll held, without all doubt, to be sufficient.

Grayson v. Atkinson, 2 Ves. 454.

16. On a bill to establish a will against an heir at law, he by his answer made a doubt, whether, as all the witnesses did not see the testator sign, this was a good attestation within the statute.

Lord Hardwicke.—"This has been *vexata questio* a great while; whether to make a will effectual, according to the statute, the signing of the testator thereto should be in the presence of all, or indeed of any of the witnesses; or whether the testator's acknowledging the handwriting to that will to be his, is not sufficient. It is insisted that the word attested, superadded to subscribed, imports they shall be witnesses to the very act and *factum* of signing; and that the testator's acknowledging that act to have been done by him, and that it is his handwriting, is not sufficient to enable them to attest; that is, it must be an attestation of the thing itself, not of the acknowledgement. To be sure it must be an attestation of the thing in some sense; but the question is, if they attest upon the acknowledgement of the testator that it is his handwriting, whether that is not an attestation of the act; and whether it is not to be construed as agreeable to the rules of law and evidence, as all other attestation and signing might be proved. At the time of making the act of parliament, and ever since, if a bond or deed is executed by the person who signs it, afterwards the witnesses are called in, and before those witnesses he acknowledges it to be his hand; that is always considered to be a signing by the person executing, and is an attestation of it by them. The case of Lemayne v. Stanley is an ex-

ante, § 10.

press authority, and must have been by an acknowledgement of the testator's hand: no answer can be given to it, but a presumption that the testator might write the will in the presence of the three witnesses; but this is not a natural presumption; for if the fact was so, it would have been found by the jury, as it would have put it out of all doubt. Therefore, on the penning of the act, and the authorities, my opinion is, that this will is well executed; but being a question of law, if the heir insists on having it tried, I will direct a trial. A trial was accordingly directed.

17. The doctrine here laid down was soon after fully confirmed by a determination of Lord Hardwicke, assisted by Sir John Strange, Lord Ch. J. Willes, and Lord Ch. B. Parker, in which it was unanimously resolved, that the declaration of a testator, before three witnesses, that a paper was his will, was equivalent to signing it before them, and constituted a good will within the 5th section of the statute of frauds.

Ellis v. Smith, 1 Ves. Jun. 10.

Westbuch v. Kennedy, 1 Ves. & B. 362.

18. It has been determined in a late case, that an attestation of a devise, by the witnesses setting their marks to the will, was good within the statute of frauds.

Harrison v. Harrison, 8 Ves. Jun. 185. Id. 504.

19. It has also been determined, that it is not necessary to the validity of the execution of a will of lands by a blind man, that it should be read over to him in the presence of the attesting witnesses.

Longchamp v. Fish, 2 Bos. & Pull. N. R. 415.

20. The witnesses ought to see the whole will, for if they only see the last sheet, on which they subscribe their names, it is doubtful whether that be sufficient. But the presumption is, that all the sheets on which a will is written are in the room where the witnesses attest, unless the contrary is proved.

Who must see the whole Will. 3 Mod. 263.

Bond v. Seawell, 3 Bur. 1773. 1 Black. R. 407.

21. Sir T. Chitty made his will, consisting of two sheets of paper, all in his own handwriting, and signed his name at the bottom of each page. The sentences and words were so connected from the bottom of each page to the top of the next, and particularly from the fourth side of the first sheet to the first side of the second sheet, that they were imperfect and nonsensical if read apart, but clear and intelligible when read together. He also made a codicil in like manner on a single sheet. The testator then called in Francis Harding, showed him both sheets of the will, and his signature to every page, told him that was his will, and also showed him the codicil, and desired him to attest both, which he did on the last sheet of the will, and on the codicil, in the presence of the testator, and then left the room. John Vaughan and John Leyland came in immediately afterwards; the testator showed them the codicil, and the last sheet of the will, and sealed them in their presence; took each of them up, and severally delivered them as his act and deed. These witnesses then attested the same in the testator's presence, but never saw the first sheet of the will, nor was it produced to them, nor was the same or any other paper on the table. After the testator's death both sheets of paper were found in his bureau, not pinned together, but wrapped up together with the codicil in one piece of paper. The question was, whether the will was duly attested, according to the statute of frauds.

The case was several times argued before all the Judges in the Exchequer Chamber; and Lord Mansfield acquainted the bar, that there had been a conference among all the Judges, except Mr. Baron Adams, who was out of town, upon this case, which

was an amicable suit, to try the real merits of the question. It occurred to the Judges, that the way in which the parties had put the case did not go to the whole merits, because if the first sheet was in the room at the time when the latter sheet was executed and attested, there would remain no doubt of its being a good will, and a good attestation of the whole will; but if the first sheet was not then in the room, a doubt might arise whether it was, or was not, a good attestation, as to the real estate. However, no opinion was given or formed by the Judges upon such doubt which might so arise, if it should appear that in fact the first sheet was not then in the room. A will properly attested might, by reference to another instrument, establish particular clauses, so ascertained by a clear reference, as strongly as if the clauses so referred to had been repeated in the will *verbatim*; and there were references in this will from one part to another. Every presumption ought to be made by a jury in favour of such a will, when there was no doubt of the testator's intention. It was not necessary that the witnesses should attest in the presence of each other, or that the testator should declare the instrument he executed to be his will; or that the witnesses should attest every page, folio, or sheet; or that they should know the contents; or that each folio, page, or sheet should be particularly shown to them. This had been settled: but the fact whether the first sheet of the will was or was not in the room, at the time of the executing and attesting the latter, might be material to be known; if it was, the jury ought to find for the will generally; and they ought to find all things favourable to the will. If it was doubtful whether the first sheet was then in the room

or not, they all thought the circumstances sufficient to presume that it was in the room, and that the jury ought to be so directed: but upon a special verdict nothing could be presumed; therefore they were all of opinion that it ought to be tried over again: and if the jury should be of opinion that it was then in the room, they ought to find for the will generally; and they ought to presume, from the circumstances proved, that the will was in the room.

And must attest it in the Presence of the Testator.

22. The statute expressly requires that the witnesses should attest and subscribe the will in the presence of the testator, lest another will should be obtruded instead of the real one.

Broderick v. Broderick, 1 P. Wms. 239.

23. Thus where a person subscribed his will in the presence of three witnesses, who, for the ease of the testator, went down into another room, and subscribed it there, it was held to be void.

24. But if there be a possibility of the testator's seeing the witness attest, it will be sufficient, unless the contrary is proved.

Shires v. Glascock, Salk. 688. 1 Ld. Raym. 507.

25. A testator desired the witnesses to go into another room, seven yards distant, to attest his will, in which there was a window broken, through which the testator might see them: and it was held that this will was well attested, according to the statute; for it was sufficient that the testator might see the witnesses, and not necessary that he should actually see them; for in that case, if a man should turn his back, or look another way, it would vitiate the will. So if the testator, being sick, should be in bed with the curtains closed.

Longford v. Eyre, 1 P. Wms. 740.

26. There were four witnesses to a will, one of whom was gone beyond sea; two of them swore that they saw the will executed by the testatrix, and

that they subscribed the same in her presence: the third swore that he subscribed the will as a witness in the same room, and at the request of the testatrix.

Lord Cowper doubted as to the proof of the execution of the will; and the matter coming on again before Lord Macclesfield, he observed, 1st. That the proper way of examining a witness to prove a will of land was, that the witness should not only prove the execution of the will by the testator, and his own subscribing it, but likewise that the rest of the witnesses subscribed their names in the presence of the testator; and then one witness proves the full execution of the will, since he proves that the testator executed it, and also that the three witnesses subscribed it in his presence. 2d. He held that the bare subscribing of the will by the witnesses in the same room, did not necessarily imply it to be in the testator's presence, for it might be in a corner of the room, in a clandestine fraudulent way; and then it would not be a subscribing by the witnesses in the testator's presence, merely because in the same room. But it being sworn by the witness that he subscribed the will at the request of the testatrix, and in the same room, this could not be fraudulent; and therefore the will was well executed.

27. A married woman having a power to make a writing in the nature of a will, ordered a will to be prepared, and went to an attorney's office to execute it; but being asthmatic, and the office very hot, she retired to her carriage, to execute the will, the witnesses attending her; who, after having seen her execute it, returned into the office to attest it, and the carriage was put back to the window of the office, through which, it was sworn by a person who was in the carriage, that the testatrix might see what passed.

Casson v. Dade, 1 Bro. R. 99.

Immediately after the attestation the witnesses took the will to her, which she folded up, and put into her pocket.

It was decreed that the will was well attested.

28. Although the witnesses to a will must subscribe in the presence of the testator, yet the statute of frauds does not require that this circumstance should be taken notice of in the attestation; and whether inserted or not, the fact, if denied, must be left to the jury; for neither the insertion or omission of this circumstance is conclusive.

Hands v. James, Com. R. 530. Willes R. 1. S. P.

29. In ejectment by an heir at law, the question for the opinion of the Court was, if it should be left to a jury to determine, whether the witnesses to a will, being all dead, set their names in the presence of the testator; and this merely upon circumstances, without any positive proof.

The Court said, this was a matter fit to be left to a jury. The witnesses, by the statute of frauds, ought to set their names as witnesses in the presence of the testatrix; but it was not required by the statute that this should be taken notice of in the subscription to the will; and whether inserted or not, it must be proved; if inserted it did not conclude, but it might be proved *contra*, and the verdict might find it *contra*. Then, if not conclusive when inserted, the omission did not conclude it was not so; and therefore must be proved by the best proof which the nature of the thing would admit of. In case the witnesses were dead, there could not probably be any express proof, since, at the execution of wills, few were present but the devisor and the witnesses. Then, as in other cases, the proof must be circumstantial; and here were circumstances. 1st. Three witnesses had set their names, and it must be intended that they did it

regularly. 2d. One witness was an attorney of good character, and might be presumed to understand what ought to be done, rather than the contrary; and there might be circumstances to induce a jury to believe that the witnesses set their hands in the presence of the testatrix, rather than the contrary: and it being a matter of fact, was proper to be left to them. The plaintiff was nonsuited.

30. The same question arose in a subsequent case, on a trial at bar in ejectment. The defendant made title under a will, the attestation of which was in these words, "Signed, sealed, published, and declared as and for his last will in the presence of us, A. B. and C." The witnesses were all dead, and their hands proved in common form. It was objected that this was not an execution, according to the statute of frauds; and the hands of the witnesses could only stand as to the facts they had subscribed to; and signing in the presence of the testator was not one.

Croft v. Pawlet, 2 Stra. 1109.

The Court, on the authority of Hands v. James, said, it was evidence to be left to a jury of a compliance with all the circumstances. A verdict was given for the will.

31. By the Roman law, it was necessary that all the witnesses should be present at the same time; and some doubts were formerly entertained, whether the same circumstance was not required by the statute of frauds. But it is now established, that although the witnesses attest at different times, yet it is sufficient.

But may attest at different Times.

32. A will of lands attested by three witnesses, who at several times subscribed their names, at the request of the testator, but were not present at once together, was decreed to be well attested, within the statute.

Anon. 2 Cha. Ca. 109.

Cook v. Parsons, Prec. in Cha. 184.

33. On a bill of review to reverse a decree of Lord Nottingham, for sale of lands, subjected by a will to the payment of debts. The will was written in the testator's own hand, and published in the presence of three several witnesses, at three several times, and they all attested it in his presence. One of the objections to the decree was, that it was no good will within the statute of frauds, because not attested by all the witnesses at one time. Lord Keeper Wright held a publication of a will before three witnesses, though at three several times, good within the statute.

Jones v. Lake, 2 Atk. 176. *n.*

34. In ejectment a special verdict was found, that a testator executed his will in the presence of two witnesses, who attested the same in his presence; that four years after the testator went over his name with a pen in the presence of a third witness, who subscribed his name in his presence, and at his request. Mr. Henley argued for the heir at law, that the statute requiring three witnesses to subscribe in the testator's presence, must intend they should be all present together, else there was not that degree of evidence which the statute required; for an attestation of three witnesses, at different times, had only the weight of one witness. Witnesses to a will not only attest the due execution of it, but likewise the capacity of the testator at the time of execution. A man might be sane at the time when two of the witnesses attest, and insane when the third attests. It could not be considered as a will till the third witness had signed it, for that completed the act.

Mr. Banks argued, on behalf of the devisee, that a will executed in the presence of three witnesses, though they attested it at different times, was good, within the statute of frauds; because that statute did

not require that all the witnesses should be present at the same time. The requisites under the statute were, that the testator should sign in the presence of three witnesses at least, and that they should attest in his presence. It would therefore be adding new requisites, which the act did not mention, and in fact making a new law.

Lord Ch. J. Lee.—"This case depends on the words of the statute; the requisites in the statute are, that the three witnesses should attest the signing of the testator; but it does not direct that the three witnesses should be all present at the same time. There has been no determination as to this point. In the case of Cook v. Parsons, the testator's signing was held good, though it was not before three witnesses at the same time; and the Court only doubted whether the testator's barely owning the subscription to be his, before one of the witnesses, was good; but there was no doubt as to the validity of the will, from the execution at different times. Here you have the oaths of three attesting witnesses; this is the degree of evidence required by the statute; and the same credit is given to three persons, at three different times, as at the same time. We cannot carry the requisites farther than the statute directs; the act is silent as to this particular; it would therefore be making a new requisite. The signing is the same act reiterated; the testator in the principal case went over his name again, and declared it to be his last will." Judgement against the heir at law.

ante, § 33.

Westbuch v. Kennedy, 1 Ves. & B. 362.

Vide 1 Ves. Jun. 14. 16.

35. It was formerly held that every will, and every codicil, must be separately attested by three witnesses: for the attestation of two witnesses to a will, and of a third witness to a codicil annexed to that will, was not sufficient, nor could the attestation of a codicil

Whether Wills and Codicils must be separately attested.

operate in any case as the attestation of a will, to which it was declared to be annexed.

Isea v. Libb, Rep. temp. Holt, 742.

86. A person made his will in writing, by which he devised lands, and sealed and published it in the presence of two witnesses only, who subscribed it in his presence. A year after, he caused another writing to be prepared, which recited that he had made his will, and confirmed it in all things; and said, "and my will is, that this codicil be taken to be of force, and part of my will."

It was found that the codicil was attested by two witnesses, one of whom was witness to the will, the other not; and it was further found, that the codicil was distinct from, and not annexed to the will.

Lord Ch. J. Holt delivered the opinion of the Court, that this was not a good will within the statute, for want of three attesting witnesses. The codicil would not carry the land without the will, nor the will without the codicil. And the three witnesses within the statute ought to be witnesses to the whole.

Att. Gen. v. Barnes, Gilb. R. 5. Prec. in Cha. 270.

87. A person devised freehold lands to a college, by a will written with his own hand, but not attested by any witness. The testator afterwards made a codicil, attested by four witnesses, wherein he recited his will.

It was determined that the attestation of the codicil could not operate so as to render the will valid; for the codicil might be executed in another place, and the witnesses might not either see or know any thing of the will.

The doctrine laid down in the above case, appears doubtful, for in Habergham v. Vincent, which will be stated hereafter, Mr. J. Wilson, whom Lord Loughborough called to his assistance, is reported to

have said—" I believe it is true, and I have found no case to the contrary, that if a testator in his will refers expressly to any paper already written, and has so described it, that there can be no doubt of the identity, and the will is executed in the presence of three witnesses, that paper makes part of the will, whether executed or not; and such reference is the same as if he had incorporated it; because words of relation have a stronger operation than any other. As Lord Coke says, in his comment on Littleton, where Littleton is speaking of the word *heirs* being necessary to raise an estate of inheritance, Lord Coke makes this exception; if A. enfeoff B. and his heirs, and B. enfeoffs A. in as full and ample a manner as A. has enfeoffed him, that will give the inheritance, without the word heirs; and it shall have effect by relation." 2 Ves. Jun. 228. 3 Burr. R. 1775.

38. Where a codicil is written on the same sheet of paper with a will, the attestation of the codicil by three witnesses establishes the will, though such will be not duly attested.

39. Sir James de Bathe by his will, attested by only one witness, appointed Lord Fingall and Mr. Cruise to be guardians to his children. By a codicil written on the same sheet of paper, the testator expressed himself in the following manner:—" I do hereby make and declare this to be a codicil to my will hereunto annexed, in which said will I am disposed to make some alterations." He then made alterations as to legacies, and concluded thus; " and in all other respects confirm my said will hereunto annexed." The codicil was attested by three witnesses. De Bathe v. Fingall, 16 Ves. 167.

Mr. Alexander contended, on behalf of the guardians, that this appointment was clearly sufficient.

The effect of a codicil, on the same sheet of paper with the will, expressly referring to it, as annexed, and confirming it in all respects, except as to the alteration of some legacies, being a re-execution and re-publication, as it would be in the case of a devise of land, there being no difference in this respect between the two statutes.

Sir W. Grant, M. R. held clearly that the appointment of guardians was good; the codicil, attested by three witnesses, adopting the will, and amounting to a re-execution and republication; and a devise of land by the will would have been made good by the codicil.

1 Ves. & Bea. 445.

40. If a will be made at several times, although the parts be distinct, and separately signed by the testator; yet if it appear from circumstances to have been the intention of the testator that both instruments should constitute but one will, and not as a will and a codicil, an attestation of the last part by three witnesses will amount to an attestation of the whole.

Carlton v. Griffin, 1 Burr. 549.

41. J. Griffin, on the 2d May 1752, wrote upon a sheet of paper, with his own hand, as follows:— "Know all men by these presents, that I John Griffin make the aforementioned my last will and testament." He then proceeded to give two freehold houses, and subscribed it; but there was no witness. In January 1754 he wrote on the same sheet of paper the following words: "Memorandum, whereas I have laid out, &c. on a lighter, &c. and the barge called The Lemon, &c.; all shall be at my wife's disposal; and this not to disannul any of the former part made by me, the 2d May 1752, except that my wife shall not be liable to pay to my son John, &c. Witness my hand, John Griffin."

The will was written on the first and second sides of a sheet of paper, and the memorandum was begun either upon the end of the second, or the beginning of the third, and written upon the third side; and all the second writing related only to the personal estate. The testator subscribed this in the presence of three witnesses; then he took the said sheet of paper in his hand, and declared it to be his last will and testament, in the presence of the said three witnesses; and then delivered it to them, and desired they would attest and subscribe it in his presence, which they accordingly did.

The question was, whether this will was duly attested according to the statute of frauds.

Lord Mansfield said, the case was accurately put; for it was not stated to be either a will or a codicil, but a sheet of paper written, &c. At first, in 1752, the testator did not know that any witnesses were necessary; in 1754 he had found they were necessary; then he made a subsequent disposition, which was a *memorandum* to be added to it; but he did not call it a codicil, nor did the case state it to be so. He plainly considered the whole as one entire disposition, and he expressly declared in the latter, that he did not thereby mean to disannul any part of the former devise or dispositions. There is not a tittle in the latter that relates to the real estate; therefore the only intent of having the three witnesses was, and must be, to authenticate the former. Then the publication of it was, as of a will; he took up the sheet of paper and said, it is my will; and certainly he did not mean a part only, but the whole of it; and he desired them to attest it: all this must relate to the whole that was written on the paper. Adjudged that the will was duly attested.

Who may be Witnesses.

42. With respect to the persons who are capable of being witnesses to a will, the statute of frauds only mentions the word credible; and therefore all those who are capable of being witnesses in any other matter, may also be witnesses to a will.

The Judges were however formerly very strict with regard to the competency of the witnesses to a will; for neither a devisee, legatee, or creditor, was allowed to be a competent witness to a will.

43. This occasioned the statute 25 Geo. II. c. 6. by which it is enacted, § 1. "That if any person attest the execution of any will or codicil, to whom any beneficial devise, legacy, estate, interest, gift, or appointment, except charges on lands, tenements, or hereditaments for payment of any debt or debts, shall be thereby given or made; such devise, legacy, estate, interest, or appointment shall, so far only as concerns such person attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void; and such person shall be admitted as a witness to the execution of such will or codicil."

Lees v. Summersgill, 17 Ves. 508.

§ 2. "In case by any will or codicil any lands, tenements, or hereditaments shall be charged with any debt or debts; and any creditor, whose debt is so charged, shall attest the execution of such will or codicil; every such creditor, notwithstanding such charge, shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act.

§ 6. "Provided always, that the credit of every such witness so attesting the execution of any will or codicil, in any of the cases in this act before mentioned, and all circumstances relating thereto, shall be subject to

the consideration and determination of the Court and the Jury, before whom any such witness shall be examined, or his testimony or attestation made use of; or of the court of equity in which the testimony or attestation of any such witness shall be made use of; in like manner to all intents and purposes as the credit of witnesses in all other cases ought to be considered and determined."

44. Two celebrated cases have been decided respecting the competence and credibility of witnesses to a will. The first is that of Wyndham v. Chetwynd, in the Court of King's Bench: and the second is that of *Doe ex dem.* Hindson v. Kersey, in the Court of Common Pleas. But as they relate to wills made before this statute, it is unnecessary to state them. 1 Burr. R. 414.

45. A legatee may be a witness against a will, because he swears against his own interest, and so is the strongest evidence. Oxendon v. Penrice, Salk. 691.

46. An infamous person is not a competent witness to a will; and therefore it was held, in a modern case, that a person who had been convicted of stealing sheep was not a competent witness to a will; for it was the crime that created the infamy, and took away a person's competency, not the punishment. Pendock v. Makender, 4 Burn Ecc. Law, 95.

47. A will must be also published; that is, the testator must do some act from which it can be concluded that he intended the instrument to operate as his will; and Lord Hardwicke has mentioned a case where, upon a trial at bar in the Court of King's Bench, the question was, whether the testator had published his will; for there was no doubt of his executing it in the presence of three witnesses, or of their having attested it in his presence; which showed that publication was, in the eye of the law, an essen- Publication. 3 Atk. 161.

tial part of the execution of the will, and not a mere matter of form.

Peate v. Ongly, 1 Com. R. 196.

48. The words, signed and published by the said A. B. as and for his last will and testament, are a sufficient publication: and the delivery of a will, as a deed, has been also held to be a sufficient publication.

Trimmer v. Jackson. 4 Burn Ecc. Law, 119.

49. A will was delivered by a testator as his act and deed; and the words sealed and delivered were put above the place where the witnesses were to subscribe. It was adjudged that this was a sufficient publication.

A Person cannot empower himself to give Lands by a Will not duly attested.

50. It has been held in several cases, which will be stated hereafter, that where a person, by a will duly attested, charged his lands with the payment of his debts and legacies; a legacy afterwards given by a will or codicil, not duly attested according to the statute of frauds, but sufficient to pass personal estate, would be good. From which it was concluded, that a person might by means of a will duly executed, empower himself to make a future disposition of lands, by another instrument, not duly executed. This doctrine, if established, would have been attended with the most serious consequences. For, as Mr. Fearne observes, "if a man might, by a will duly attested, devise his lands upon such trusts as he should appoint by any other instrument, it would in effect amount to a repeal of the statute of frauds, in respect to the solemnities of testamentary dispositions of land. A man would have nothing to do, but on his coming of age, to make one general repeal of that statute, in regard to himself, by devising his whole real estate to some nominal persons and their heirs, upon such trusts, &c. as the testator should afterwards by any writing appoint: and he

Opin. 435.

might, by reference to such repealing will, at any time make a testamentary disposition of the estates, without the least attention to the ceremonies required by the statute. This would let in all the inconveniencies of frauds and perjuries intended to be prevented by the last-mentioned statute, in regard to testamentary dispositions of land: nay, the legal absolution might possibly be extended to the statute of wills, as well as that of frauds, &c.; and by considering the first intermediate will a sufficient compliance, as well with the requisition of writing, required by one statute, as of the ceremonies of execution, by the other, a parol appointment of the trusts might be attempted, under a power worded for that purpose in the original absolving will."

This opinion has been established as good law, by the following determination.

51. Samuel Hill, by a will duly attested, devised his freehold estates to five trustees, and the survivors and survivor of them, their and his heirs and assigns, to the use of his grand-daughter for life, remainder to her first and other sons in tail male, remainder to her daughters as tenants in common in tail general, remainder unto or for the use of such person or persons, and for such estate or estates, as he, by any deed or instrument to be executed by him, and attested by two or more credible witnesses, should direct, limit, or appoint. The devisor, by a deed-poll dated the day after, under his hand and seal, attested by two witnesses, after reciting his will, in pursuance of the power thereby reserved to him, limited and appointed his estates, after the death of his grand-daughter, and failure of her issue, to the first and other sons of his son, &c. A question was referred by the Court of Chancery to the Court of King's Bench,

Haberghan v. Vincent, 5 Term R. 92.

whether the two instruments, taken together, were, at the time of the death of the devisor, sufficient to pass any estate or interest in the freehold premises, not given by the first instrument.

The Court of King's Bench certified their opinion, that the two instruments taken together were not sufficient to pass any estate or interest in the freehold premises, not given by the first instrument; on the ground, that the second instrument was a deed and not a will.

2 Ves. Jun. 204.

The cause coming on for further directions, Lord Loughborough called to his assistance Mr. J. Buller, and Mr. J. Wilson, and they were all of opinion that the second instrument was testamentary; but not being attested according to the statute of frauds, could have no operation or effect.

Vide Rose v. Cunningham, infra.

Wills charging Lands are within the Statute.

52. The statute of frauds requires that all devises of lands or tenements shall be executed in the manner above stated; and it has been determined, that all devises by which terms for years, or other interests arising out of lands, are created, or by which powers to sell or charge lands are given, are within the statute. And therefore where an estate is devised for a term of years, or a sum of money is given originally and primarily out of land, a will containing such a charge, must be executed in the manner prescribed by the statute; because it is the same as a devise of the land, since the term of years is an interest in the land; and money thus given can only be raised by a sale of the land.

2 Atk. 272. 2 Ves. 179.

But not Wills or Codicils giving Legacies.

53. There is one exception to this rule, which has been already mentioned; namely, where a will duly executed according to the statute, contains a general charge on lands, in aid of the personal estate, it will extend to legacies given by a subsequent will or codicil, not duly attested.

Hyde v. Hyde, 1 Ab. Eq. 409.

54. Richard Boughton, by a will executed according to the statute of frauds, gave his sister 400*l.* and the remainder of his estate, after payment of his debts and legacies, to his brother. By another will, not duly attested, he gave to the same sister 100*l.*, and to another sister 400*l.*, and all the rest of his estate, real and personal, to his brother. One of the questions in this case was, whether the legacies given by the second will, could be considered as charged upon the land, by the first will; the testator having subjected his real estate to the payment of his debts and legacies.

Brudenell v. Boughton, MS. Rep. 2 Atk. 268.

Lord Hardwicke. — "I am of opinion, that the lesser legacies given by the second will, are chargeable upon the lands devised by the first. Consider them first as new original legacies; the second will is a complete disposition of his personal estate; and if a man charges his lands by his will with all his debts and legacies, and afterwards gives other legacies by a codicil, not properly executed within the statute of frauds, the new legacies would affect the land, notwithstanding the insufficiency of the codicil to pass lands; because this is considered as done in execution of a power which the testator had reserved to himself, by charging his lands with his debts and legacies in general; according to Masters v. Masters, 1 P. Wms. 421. And there is no more inconvenience in this, than in a charge upon his lands of all his debts; where debts contracted at any time after, during his life, would certainly affect all his lands. So if a man makes two wills, one of his real, the other of his personal estate, legacies given by the second will, though executed only so as to pass the personal estate, would still affect the land, if there was a general charge of his debts and legacies upon the

land, by the first. But in our case the second legacies are not new legacies, they are but a modification of the former; and had they been given in the same manner as the first, there could not have been a doubt of this matter. The difficulty arises only from the difference of interests given by the one will, and the other; but still it is only an alteration of the intent of the testator as to the *quantum*, and a modification of the former; they remain part of the former, and the revocation but *pro tanto*."

Vide 5 Term R. 95.

Fearne's Op. 434.
8 Ves. 495.

55. This doctrine is founded on the principle, that a charge of debts or legacies amounts to no more than making the real estate auxiliary to the personal; or in other words directing it to be converted into, and applied as part of the testator's personal estate, and in aid thereof. And Mr. J. Buller, in the case of Habergham v. Vincent, cited the case of the Duke of Bolton v. Williams, in which a term for years was created by a will duly attested, for payment of all such legacies as the testator should mention in a codicil. He afterwards made a codicil unattested, giving legacies and annuities; the annuities were held to be legacies. And Lord Loughborough observed, that all the cases of this kind were not cases of a primary substantive and independent charge upon the real estate, but a charge upon it in aid of the personal, which was primarily charged; and that the statute of frauds did not prevent a man from creating, by will, a fluctuating charge upon real, in aid of personal.

2 Ves. Jun. 231.

Smart v. Prujean, 6 Ves. 560.

56. But if a person by a will duly attested, charges his real estate with such legacies and annuities as he shall afterwards give and charge upon that estate, whether attested or not; a charge by an unattested codicil will not be good.

57. A person by his will duly executed, devised to trustees, their heirs, executors, &c., a plantation in the island of Grenada, upon trust, by and out of the produce thereof, to pay off debts and incumbrances; and also to pay off and discharge all such annuities, legacies, or bequests, as he should give by his will, or by any codicil or codicils thereto, or by any writing or writings at any time or times after signed by him, or in his own handwriting, whether witnessed or not. Rose v. Cuninghame, 12 Ves 29.

The testator by an unattested codicil gave an additional annuity of 100*l.* to his wife, out of his Grenada estate; and the question was, whether this codicil was sufficient to charge the Grenada estate.

Sir W. Grant, M. R.—"The ground upon which it is contended that this additional annuity of 100*l.* might be good as a charge upon the Grenada estate is, that the estate being once charged with all legacies and annuities, the testator may afterwards give either legacies or annuities by an unattested codicil. That the rule is so settled in many cases; and if this were that case, unquestionably it is too well established to be now disturbed; though it may be doubted whether it is perfectly consistent with the statute of frauds; for in effect the testator does dispose of his land by an unattested codicil, when he is at liberty to burthen it with legacies so given. However, in this case, the testator does not charge the Grenada estate with legacies or annuities generally, but with such only as he shall afterwards give and charge upon that estate; so that, as legacy or annuity, it is not at all chargeable upon the estate; but it is as he has thought fit, by an unattested codicil, to declare, that it shall be a charge upon the estate. The reason that debts and legacies may be a burthen upon the

estate, is, that they constitute a fluctuating charge. It is impossible previously to ascertain what debts a man may owe at the time of his death; and it is difficult to ascertain, when he is making his formal and regular will, what legacies he may think fit, or his fortune shall enable him to give. The Court has therefore said, that when he has by a will duly executed, charged debts and legacies, it is only necessary to show that there is a debt, or that there is a legacy, in order to constitute a charge; for the moment that character is shown to belong to the demand, you show that it is already charged upon the estate. Then an unattested instrument is itself perfectly competent to give a legacy; and when given, you predicate of it, that it is a legacy; and then the charge immediately attaches, by virtue of the executed will. But here, the testator says, he does not now determine that all annuities, and all legacies he shall hereafter give, shall be charges; but only that if at some future period he shall think proper to declare legacies and annuities to be charges upon this real estate, then the trustees shall pay them out of the real estate. Therefore not only the legacy is to be found, but also the will of the testator, to make it a charge upon this estate; without which it is not a charge. That is only an attempt to reserve, by a will duly executed, a power to charge by a will not duly executed. It is the case of Habergham v. Vincent. It might as well have been contended in that instance that there was an adoption into the will of that future instrument. But the opinion of the Lord Chancellor and the Judges was, that it was not competent to a man to give himself such a power; viz. a power to dispose of land by an unattested instrument. That is the reservation this testator

ante, § 51.

attempts to make; for unless he thinks fit, when he makes his codicil, to declare his intention that his land shall be charged with the legacy or annuity, it shall not be charged. Then it is through the medium of an unattested instrument that it is to be a charge upon land; and that cannot be within that case."

Wills of Trust Estates are within the Statute.

58. Although a trust estate is now, what a use was before the statute 27 Hen. VIII., yet it is settled that it can only be devised by a will executed according to the statute of frauds.

Wagstaff v. Wagstaff, 2 P. Wms. 258.

3 Atk. 151.

59. Lands were conveyed to trustees and their heirs, to the use of them and their heirs, in trust, after raising certain sums of money, to convey the premises to J. S. and his heirs. J. S. by a will, attested by two witnesses only, devised his trust estate to J. N.

Lord Macclesfield said, there could be no question but that a trust of an inheritance could not be devised, otherwise than by a will duly attested by three witnesses, in the same manner as a legal estate; for if the law were otherwise, it would introduce the same inconveniencies as to frauds and perjuries, as were occasioned before the statute by a devise of a legal estate.

And of Mortgages and Equities of Redemption.

60. An estate in mortgage, though only held as a pledge for securing the repayment of money borrowed, can only be devised by a will executed according to the statute of frauds. The same rule applies to an equity of redemption, which is considered as real estate, and similar to a trust.

Fit. 15. c. 2 § 41.

61. Some modern writers have asserted, that where a mortgagee gives the money secured by a mortgage by an unattested will, the legal estate in the lands comprised in the mortgage will pass. But I can find no authority for this position: and I apprehend that

nothing more than the money would pass, with a right in equity to call on the heir of the mortgagee for a conveyance of the land.

But not Wills of Copyholds. ante, c. 4.

62. It has been stated, that the statute of wills does not extend to copyhold estates; that the power of devising them is indirectly exercised by means of a surrender to the use of a will: and it has been determined, that in such cases a will need not be executed according to the statute of frauds; because the copyhold passes by the surrender, not by the will; which is only a declaration of the uses of the surrender.

ante, § 59.

63. Thus in the case of Wagstaff v. Wagstaff, Lord Macclesfield said, "That as to the case which had been put of a copyhold surrendered to the use of a will, and afterwards devised by a will attested by one or two witnesses, this had been adjudged to be good; and his opinion was, *never to shake any settled resolutions touching property, or the title of land;* it being for the common good that these should be certain and known, however ill-grounded the first resolution might be. But if that had not been settled, it might be more reasonable to say; when I have surrendered my copyhold to the use of my will, a will of this copyhold shall be so executed, and in such manner, as by the act of parliament a will of lands ought to be executed; but this case having been ruled otherwise, he would not shake it; however, he was not for carrying it one jot further."

Habergham v. Vincent, 2 Ves. Jun. 204.

Carey v. Askew, 2 Bro. R. 58.

64. In a modern case, there was a will duly executed to pass lands; and a paper of instructions for a new will, which the testator did not live to execute; but which had been proved in the Ecclesiastical Court as a testament. And one of the questions was, whether copyholds surrendered to the use of the will,

would pass by the unattested paper. The Master of the Rolls (Sir L. Kenyon) said it had been held, that a will received by the Ecclesiastical Court, would govern the surrender of a copyhold. It would be removing landmarks to entertain a doubt upon the subject. He was clear therefore that the will passed the copyhold.

Doe v. Danvers, 7 East, 299.

65. Mr. Peere Williams states it to have been laid down by Sir Joseph Jekyll, that if a copyholder be entitled only to the trust, or equity of redemption of a copyhold, and devises such trust or equity of redemption, there must be three witnesses to the will: for here can be no precedent surrender to the use of the will, to pass this trust; and the trust and equity of redemption of all lands of inheritance are within the statute of frauds; otherwise great inconveniencies would arise therefrom. But in a subsequent case, Lord Hardwicke was of opinion that the trust of a copyhold would pass by a will not attested according to the statute of frauds; as a copyhold surrendered to the use of a will would do; for that equity ought to follow the law, and make it at least as easy to convey a trust, as a legal estate.

2 P. Wms. 261.

Tuffnel v. Page, 2 Atk. 37.

66. If the surrender of a copyhold to the uses of a will, requires that the will should be attested by three witnesses, a devise of such copyhold must be so attested; otherwise it will be void.

Goodwin v. Kilshaw, Amb. 684.

67. A devise of customary freeholds, where there is no custom to surrender them to the use of a will, must be executed according to the statute of frauds; and a trust estate in them must be devised in the same manner.

Hussey v. Grills, Amb. 299.

68. As terms for years already created were disposable by testament before the statutes of wills, they are not comprehended within the statute of

Or of Terms for Years.

frauds, and may therefore be given by a will not executed according to that statute. But it has been already observed, that a term cannot be created by will, unless such will be executed according to the statute of frauds.

ante, § 52.

69. All wills relating to terms for years must be proved in the ecclesiastical courts having jurisdiction over the place where the lands lie; for otherwise they will have no effect, as to the terms.

Except Terms attendant on the Inheritance.

70. If however a term for years becomes attendant on the inheritance, it is then considered as part of the inheritance, and not a chattel real; and can only be devised by such a will as would pass the inheritance.

Whitchurch v. Whitchurch, 2 P. Wms. 236.

71. Thus where Ed. Whitchurch, having purchased a term in the name of a trustee, and the inheritance in his own name, by a will not executed according to the statute of frauds, devised the premises to the son of a younger brother; the heir at law of the testator brought her bill in Chancery, in order to compel the executor and devisee to assign over the term to her. It was objected for the defendants, that the executor had assented to the devise; and that the will, though not attested by three witnesses, was good at law to pass the term. But decreed, that as this was a term which would have attended the inheritance, and in equity have gone to the heir, and not to the executor; in which respect it was to be considered as part of the inheritance; so the will, which was not attested by three witnesses, as the law required it to be when land was to pass, should not carry this term. Though it was true, such a will as in the present case, would be sufficient to pass a term in gross, yet should it not pass the trust of a term attendant on the inheritance, nor consequently the term itself.

2 Atk. 72.

72. A will made in a foreign country, of lands in England, must be executed in the same manner, and attested by the same number of witnesses, as if made in England.

Wills made abroad within the Statute. Coppin v. Coppin, 2 P. Wms. 293.

73. It has been a common practice for a long time, where a title depends upon a will, to prove the execution of it *per testes* in Chancery. But Lord King has said that this is not absolutely necessary, to make out the title, any more than it would be to prove the execution of a deed in equity, by which the estate was settled from the heir at law, after the ancestor's death. The will prevents and breaks the descent to the heir, as much as a deed; and the hands of the witnesses to the will may be as well proved, as those to a deed. Now, as it would be no objection to a title, if a modern deed, on which the title depended, was not proved in equity; why should it be so in the case of a will, where the same appears to be duly attested by three witnesses, whose names are mentioned to have been subscribed in the presence of the testator.

The Execution of a Will may be proved in Chancery. Colton v. Wilson, 3 P. Wms. 192.

Fearne's Opin. 234.

TITLE XXXVIII.

DEVISE.

CHAP. VI.

Of the Revocation of Devises.

1. *All Devises are revocable.*
2. *Of express Revocations.*
4. *A subsequent Will revoking or inconsistent with a former one.*
8. *Otherwise both Wills are good.*
15. *Two inconsistent Wills of the same Date are void.*
16. *A second unattested Will revokes Legacies.*
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91. *Unless it extends to other things.*
93. *Of partial Revocations.*
102. *Revocations of Leaseholds.*

Section 1.

All Devises are revocable.

ALTHOUGH a devise of lands differs in many respects from a testament of personal estate, yet there are some circumstances common to both; one

of which is, that a devise is revocable at any time during the life of the devisor; so that although a person should declare his will to be irrevocable in the strongest terms, yet he may revoke it; because his own acts or words cannot alter the disposition of the law, so as to make that irrevocable, which in its own nature is revocable. Bac. Max. 19. 8 Rep. 82 *a*.

2. Devises of lands made in pursuance of the particular customs of boroughs, or by virtue of the statutes of wills, might have been revoked by words only, without writing; the statutes of wills giving power to any person seised in fee of lands, to devise them by writing; but being silent as to revocations. This was remedied by the sixth section of the statute of frauds, by which it is enacted, "That no devise in writing of any lands, tenements, or hereditaments, or any clause thereof, shall be revocable, otherwise than by some other will, or codicil, in writing, or other writing declaring the same; or by burning, cancelling, tearing, or obliterating the same, by the testator himself, or in his presence, or by his directions and consent. But all devises and bequests of lands and tenements shall remain and continue in force, until the same be burnt, cancelled, torn, or obliterated, by the testator, or by his directions, in manner aforesaid; or unless the same be altered by some other will, or codicil, in writing; or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same." Of express Revocations.

3. Under this statute there are three express modes of revoking a will: 1°. By a subsequent will, or codicil duly attested according to the statute. 2°. By an express declaration in writing, that the testator means to revoke his will; and, 3°. By burning, cancelling, tearing, or obliterating it.

A subsequent Will revoking or inconsistent with a former one.

4. A subsequent will operates as a revocation of a former one, in all cases where it contains an express clause revoking all former wills, or where it makes a different and incompatible disposition of the lands devised by the former one.

5. The intention of a testator to revoke a will, is the circumstance which constitutes the revocation; and when that appears in a subsequent will, it is sufficient; though such subsequent will should not take effect, from any disability in the devisee.

1 Roll. Ab. 614.

6. Thus where a person devised lands to A. B., and afterwards devised the same lands to the poor of the parish of C., which was void; they not having the capacity to take; yet it was held to be a revocation. So a devise to a corporation, though void, was held to be a revocation of a former devise.

Roper v. Ratcliffe, 10 Mod. 233.

7. In a subsequent case it was held, that a devise to a Roman catholic, who was at that time incapable of taking by devise, should notwithstanding operate as a revocation of a former will.

Otherwise both Wills are good. Just. Inst. lib. 2. tit. 17. § 2.

8. By the Roman law a subsequent will operated in all cases as a revocation of a former one. *Posteriori quoque testamento, quod jure perfectum est, superius rumpitur.* The reason of this rule was, because the essence of a Roman testament consisted in the institution of an heir, who took the whole property of the testator; so that two wills could never subsist at the same time, as there could not be two distinct owners of the same thing. *Quicunque testamentum facit, censetur de omnibus bonis disponere, ut non magis duo testamenta simul consistere possint, quam duo domini ejusdem rei in solidum constitui.* But although the law of England has adopted the principles of the Roman law, respecting wills of personal property; yet Lord Mansfield has said, that a devise of lands is

Vinius Comm.

looked upon in a very different light, being considered as an appointment of lands to a particular person; from which it followed, that a man might as well dispose of part of his lands, by his will, as of the whole. Cowp. Rep. 90.

9. In consequence of this principle it has been determined, that where a second will has not a clause of revocation of all former wills, and does not make any disposition inconsistent with a former will, it does not operate as a revocation of such former will, but both are good.

10. A person devised lands to his younger son and his heirs. He afterwards married, and by another will in writing, devised the same lands to his wife for life, paying yearly to his younger son and his heirs a certain rent. Anderson and Glanville held it to be no revocation, but that both wills might stand together, the latter not being contrary to the former; and there being no express revocation. The intention of the testator being only to provide for his wife, and not to alter the devise to his son; for the giving him a rent, showed he intended that he should take the reversion. Coward v. Marshall, Cro. Eliz. 721.

11. Where a jury found that a testator had made a second will, the contents of which were unknown; such second will was held not to operate as a revocation of the first; because it did not appear, either that it contained a clause revoking the first will, or that it made a different disposition of the same lands.

12. In ejectment the jury found a special verdict, that Sir H. Killigrew being seised in fee, made his will in writing, and afterwards made another will in writing; but as to the contents thereof, they were entirely ignorant; and the Court of King's Bench Hungerford v. Nosworthy, Hard. 374. Hitchins v. Bassett, 3 Mod. 203. Salk. 592.

was of opinion, that the second will was not a revocation of the first.

Show. Parl. Ca. 146.

Upon a writ of error in the House of Lords, it was argued for the plaintiff, that the second will could not be considered as a duplicate of the first, but must be deemed a revocation of it; that no will was good but the last; that every will was revocable until death; that the making another will imported a revocation of all former ones, even though it was not so expressly declared. On behalf of the defendant it was contended, that every latter will was not a revocation; for a man might dispose of one part of his estate by one will, and of another part by another will. So if a man purchased lands after he had made his will, he might make another will of those. Therefore the second will, in this case, might relate to other lands, and be no revocation.

The judgment was affirmed.

13. In a modern case this doctrine was carried still farther: for where a jury found that a testator had made a second will, different from the first; but without finding in what that difference consisted; the House of Lords determined that such second will did not revoke the former one.

Goodright v. Harwood, 3Wils.R.497. 2BlackR.937. Cowp. 87.

14. Upon a special verdict, it appeared that John Lacey, being seised in fee of a set of chambers in Lincoln's Inn, made a will in the year 1748, by which he devised all his real and personal estate to Frances Harwood. That in the year 1756, he made another will, different from the former one, but in what particulars were unknown to them. They did not find that the testator cancelled his second will, or that the defendant had destroyed the same; but of what was become of the said will, the jurors were altogether ignorant. The question was, whether the devise in

the will of 1748, to Frances Harwood, was revoked by the will found to have been executed in 1756.

Judgment was given in the Court of Common Pleas, that the will of 1748 was revoked. Upon a writ of error in the Court of King's Bench, that judgment was reversed.

A writ of error was brought in the House of Lords, where it was contended on behalf of the plaintiff, that the title of the heir at law, being a clear substantive title, ought not to be defeated, but by a title equally clear and unexceptionable: that the title of a devisee must be founded on that which is clearly known to be the ultimate intention of the testator; and it was not sufficient that the testator did, at one time of his life, mean to give his estate to the devisee, unless he continued in that intention to the time of his death. The jury had found that the testator had made a second will, executed according to law; and that the disposition made by the testator in his second will, was different from the disposition in his first will; and though the jury said they were unable to ascertain the particulars, yet the finding necessarily imported that they had received sufficient satisfaction, as to the general contents, to enable them upon their oaths to find that, from whence the courts must see, that the testator's intention was generally changed; and consequently that the first will was revoked. That the jury having found that Mr. Lacey did, in 1756, duly execute another will, the same must be taken to subsist at the time of his death, unless a subsequent change of intention appeared; but the jury had excluded the idea of any such change, by declaring they did not find that the testator had cancelled the second will; and as the jury had not found it cancelled, the Court could not say it was so. By estab-

7 Bro. Parl. Ca. 489.

nothing more than the money would pass, with a right in equity to call on the heir of the mortgagee for a conveyance of the land.

But not Wills of Copyholds. ante, c. 4.

62. It has been stated, that the statute of wills does not extend to copyhold estates; that the power of devising them is indirectly exercised by means of a surrender to the use of a will: and it has been determined, that in such cases a will need not be executed according to the statute of frauds; because the copyhold passes by the surrender, not by the will; which is only a declaration of the uses of the surrender.

ante, § 59.

63. Thus in the case of Wagstaff v. Wagstaff, Lord Macclesfield said, "That as to the case which had been put of a copyhold surrendered to the use of a will, and afterwards devised by a will attested by one or two witnesses, this had been adjudged to be good; and his opinion was, *never to shake any settled resolutions touching property, or the title of land;* it being for the common good that these should be certain and known, however ill-grounded the first resolution might be. But if that had not been settled, it might be more reasonable to say; when I have surrendered my copyhold to the use of my will, a will of this copyhold shall be so executed, and in such manner, as by the act of parliament a will of lands ought to be executed; but this case having been ruled otherwise, he would not shake it; however, he was not for carrying it one jot further."

Habergham v. Vincent, 2 Ves. Jun. 204.

Carey v. Askew, 2 Bro. R. 58.

64. In a modern case, there was a will duly executed to pass lands; and a paper of instructions for a new will, which the testator did not live to execute; but which had been proved in the Ecclesiastical Court as a testament. And one of the questions was, whether copyholds surrendered to the use of the will,

would pass by the unattested paper. The Master of the Rolls (Sir L. Kenyon) said it had been held, that a will received by the Ecclesiastical Court, would govern the surrender of a copyhold. It would be removing landmarks to entertain a doubt upon the subject. He was clear therefore that the will passed the copyhold.

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65. Mr. Peere Williams states it to have been laid down by Sir Joseph Jekyll, that if a copyholder be entitled only to the trust, or equity of redemption of a copyhold, and devises such trust or equity of redemption, there must be three witnesses to the will: for here can be no precedent surrender to the use of the will, to pass this trust; and the trust and equity of redemption of all lands of inheritance are within the statute of frauds; otherwise great inconveniencies would arise therefrom. But in a subsequent case, Lord Hardwicke was of opinion that the trust of a copyhold would pass by a will not attested according to the statute of frauds; as a copyhold surrendered to the use of a will would do; for that equity ought to follow the law, and make it at least as easy to convey a trust, as a legal estate.

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69. All wills relating to terms for years must be proved in the ecclesiastical courts having jurisdiction over the place where the lands lie; for otherwise they will have no effect, as to the terms.

Except Terms attendant on the Inheritance.

70. If however a term for years becomes attendant on the inheritance, it is then considered as part of the inheritance, and not a chattel real; and can only be devised by such a will as would pass the inheritance.

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71. Thus where Ed. Whitchurch, having purchased a term in the name of a trustee, and the inheritance in his own name, by a will not executed according to the statute of frauds, devised the premises to the son of a younger brother; the heir at law of the testator brought her bill in Chancery, in order to compel the executor and devisee to assign over the term to her. It was objected for the defendants, that the executor had assented to the devise; and that the will, though not attested by three witnesses, was good at law to pass the term. But decreed, that as this was a term which would have attended the inheritance, and in equity have gone to the heir, and not to the executor; in which respect it was to be considered as part of the inheritance; so the will, which was not attested by three witnesses, as the law required it to be when land was to pass, should not carry this term. Though it was true, such a will as in the present case, would be sufficient to pass a term in gross, yet should it not pass the trust of a term attendant on the inheritance, nor consequently the term itself.

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72. A will made in a foreign country, of lands in England, must be executed in the same manner, and attested by the same number of witnesses, as if made in England.

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73. It has been a common practice for a long time, where a title depends upon a will, to prove the execution of it *per testes* in Chancery. But Lord King has said that this is not absolutely necessary, to make out the title, any more than it would be to prove the execution of a deed in equity, by which the estate was settled from the heir at law, after the ancestor's death. The will prevents and breaks the descent to the heir, as much as a deed; and the hands of the witnesses to the will may be as well proved, as those to a deed. Now, as it would be no objection to a title, if a modern deed, on which the title depended, was not proved in equity; why should it be so in the case of a will, where the same appears to be duly attested by three witnesses, whose names are mentioned to have been subscribed in the presence of the testator.

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SECTION 1.

All Devises are revocable.

ALTHOUGH a devise of lands differs in many respects from a testament of personal estate, yet there are some circumstances common to both; one

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2. Devises of lands made in pursuance of the particular customs of boroughs, or by virtue of the statutes of wills, might have been revoked by words only, without writing; the statutes of wills giving power to any person seised in fee of lands, to devise them by writing; but being silent as to revocations. This was remedied by the sixth section of the statute of frauds, by which it is enacted, "That no devise in writing of any lands, tenements, or hereditaments, or any clause thereof, shall be revocable, otherwise than by some other will, or codicil, in writing, or other writing declaring the same; or by burning, cancelling, tearing, or obliterating the same, by the testator himself, or in his presence, or by his directions and consent. But all devises and bequests of lands and tenements shall remain and continue in force, until the same be burnt, cancelled, torn, or obliterated, by the testator, or by his directions, in manner aforesaid; or unless the same be altered by some other will, or codicil, in writing; or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same." Of express Revocations.

3. Under this statute there are three express modes of revoking a will: 1°. By a subsequent will, or codicil duly attested according to the statute. 2°. By an express declaration in writing, that the testator means to revoke his will; and, 3°. By burning, cancelling, tearing, or obliterating it.

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Show. Parl. Ca. 146.

Upon a writ of error in the House of Lords, it was argued for the plaintiff, that the second will could not be considered as a duplicate of the first, but must be deemed a revocation of it; that no will was good but the last; that every will was revocable until death; that the making another will imported a revocation of all former ones, even though it was not so expressly declared. On behalf of the defendant it was contended, that every latter will was not a revocation; for a man might dispose of one part of his estate by one will, and of another part by another will. So if a man purchased lands after he had made his will, he might make another will of those. Therefore the second will, in this case, might relate to other lands, and be no revocation.

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14. Upon a special verdict, it appeared that John Lacey, being seised in fee of a set of chambers in Lincoln's Inn, made a will in the year 1748, by which he devised all his real and personal estate to Frances Harwood. That in the year 1756, he made another will, different from the former one, but in what particulars were unknown to them. They did not find that the testator cancelled his second will, or that the defendant had destroyed the same; but of what was become of the said will, the jurors were altogether ignorant. The question was, whether the devise in

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Judgment was given in the Court of Common Pleas, that the will of 1748 was revoked. Upon a writ of error in the Court of King's Bench, that judgment was reversed.

A writ of error was brought in the House of Lords, where it was contended on behalf of the plaintiff, that the title of the heir at law, being a clear substantive title, ought not to be defeated, but by a title equally clear and unexceptionable: that the title of a devisee must be founded on that which is clearly known to be the ultimate intention of the testator; and it was not sufficient that the testator did, at one time of his life, mean to give his estate to the devisee, unless he continued in that intention to the time of his death. The jury had found that the testator had made a second will, executed according to law; and that the disposition made by the testator in his second will, was different from the disposition in his first will; and though the jury said they were unable to ascertain the particulars, yet the finding necessarily imported that they had received sufficient satisfaction, as to the general contents, to enable them upon their oaths to find that, from whence the courts must see, that the testator's intention was generally changed; and consequently that the first will was revoked. That the jury having found that Mr. Lacey did, in 1756, duly execute another will, the same must be taken to subsist at the time of his death, unless a subsequent change of intention appeared; but the jury had excluded the idea of any such change, by declaring they did not find that the testator had cancelled the second will; and as the jury had not found it cancelled, the Court could not say it was so. By estab-

7 Bro. Parl. Ca. 489.

Bibb v. Thomas, 2 Black. R. 1043.

31. One Patin, who had for two months together frequently declared himself discontented with his will, being one day in bed, near the fire, ordered Mary Wilson, who attended him, to fetch his will, which she did, and delivered it to him, it being then whole, only somewhat erased. He opened it, looked at it, then gave it something of a rip with his hands, and so tore it as nearly to tear a bit off, then rumpled it together and threw it on the fire, but it fell off. However, it must soon have been burnt, had not Mary Wilson taken it up, and put it into her pocket. Patin did not see her take it up, but seemed to have some suspicion of it, as he asked her what she was at, to which she made little or no answer. He at several times after said, that was not, and should not be his will, and bid her destroy it. She said at first, so I will when you have made another; but afterwards, upon his repeated inquiries, she told him she had destroyed it; though in fact it was never destroyed, and she believed he imagined it was so. She asked him, when the will was burnt, to whom his estate would go; he answered, to his sister and her children. He afterwards told one J. E. that he had destroyed his will, and should make no other, till he had seen his brother John Mills, and desired J. E. would tell him so, and that he wanted to see him. He afterwards wrote to Mills in these terms: "Dear brother, I have destroyed my will which I made; for, upon serious consideration, I was not easy in my mind about that will:" afterwards desires him to come down, "for if I die intestate, it will cause uneasiness." He however died without making any other will.

The jury, with whom the judge concurred, thought this a sufficient revocation of the will; and therefore found a verdict for the heir. A motion was

made for a new trial, " and, *per totam curiam*, this is a sufficient revocation. A revocation under the statute may be effected, either by framing a new will, amounting to a revocation of the first, or by some act done to the instrument or will itself; viz. burning, tearing, cancelling, or obliteration by the testator, or in his presence, and by his directions and consent; but these must be done *animo revocandi*; each must accompany the other. Revocation is an act of the mind, which must be demonstrated by some outward and visible sign or symbol of revocation. The statute has specified four of these; and if these or one of them are performed in the slightest manner, this, joined with the declared intent, will be a good revocation. It is not necessary that the will or instrument itself be totally destroyed or consumed, burnt or torn to pieces. The present case falls within two of the specific acts described by the statute. It is both a burning and a tearing; throwing it on the fire with an intent to burn, though it is only very slightly singed, and falls off, is sufficient within the statute.

The rule for a new trial was discharged.

An Obliteration of Part does not revoke the Whole.

32. An obliteration or alteration of part of a will, does not operate as a revocation of the whole will, but only of the parts obliterated, and the rest remains good.

Burkitt v. Burkitt, 2 Vern. 498.

33. A. by will in writing, duly attested, devised to his wife a copyhold estate. A. on the day he died, directed B. to obliterate some devises, but nothing as to the copyhold; and then caused a memorandum to be wrote, that he had examined and approved of the will, as so obliterated and altered in his presence by B., but did not republish it in the presence of three witnesses; but directed B. to carry it to one to write

it fair; and before it was brought back he becam delirious. Held to be a good will of the copyhold.

Sutton v. Sutton, Cowp. 812.

34. Robert Sutton made his will, duly attested, an thereby gave all his estates, except a house at Bath to trustees, in trust to sell, and to place out th money on government or real securities, for the pu poses therein mentioned. The testator afterward made several alterations, obliterations, and interline tions, in different parts of the will, which were no attested; but did not erase or alter the devise to th trustees. It was certified by the Court of King' Bench, upon a case sent out of Chancery, that th devise of the real estate to the trustees was no revoked.

Larkins v. Larkins, 3 Bos. & Pul. 16.

35. A person devised a real estate to three trustee and their heirs, upon trust to sell. Some time after the testator struck out the name of one of the trustees, by drawing a pen through it; and the question was, whether the devise to the trustees was revoked by the erasure of the name of one of them, after the execution of the will.

Upon a case sent from the Court of Chancery for the opinion of the Court of Common Pleas, Lord Alvanley said, that a revocation by obliteration would have the same effect which a revocation by any other means would have, and no more. That the devisees must be considered in a court of law as joint tenants in fee absolutely. That it was argued that the revocation of the devise, as to one devisee, made an alteration in the interest of the others; but whatever this alteration was, it was not an alteration arising from a new gift, but merely from a revocation. If the remaining devisees were to acquire any estate which they had not before, something beyond a mere

revocation would be necessary. If therefore the devisees had been tenants in common, upon the erasure of one name, the remaining two would take no more than two thirds of the estate.

The Court certified that the devise of the estate to the two trustees, to whom, together with the third trustee, the said estate was devised, as joint tenants, in trust to be sold, was not revoked by the testator's having struck out the name of the third trustee, after the execution of the said will.

36. T. Carwardine duly made his will, by which he devised the premises in question to J. Spillman and E. Aldridge, upon several trusts. The testator afterwards made several alterations in the will, and among others struck out the name of J. Spillman, and introduced the names of J. Wood and J. Adey; and did not afterwards republish his will. The question was, whether it was revoked or not. Short v. Smith, 4 East, 419.

Lord Ellenborough.—" It has been contended in this case that the testator T. C. has died intestate, as to the premises in question, and that his heir at law is entitled to recover; inasmuch as the obliteration of the name of J. Spillman, one of the devisees in trust, must have been taken to have been done *animo revocandi*, and is a revocation of the devise made of the premises: and that it must be also taken that his intention was to have another will, accompanied with the solemnities required by the statute of frauds; or at least to have republished the will, obliterated and altered as it is: on which the question arises; and the case in Dyer, 310 *b.* has been relied on. The facts of this case plainly show that the testator had no object but to change his trustee; and it would be unreasonable, when he has not, by any thing he has done, indicated any intention to dispose

of his lands to different purposes than those declared by his will, and when it clearly appears that he meant to disinherit his heir at law, to infer that he designed that his will should become inoperative, and so let in his heir at law, by what he did; rather than to conclude that he thought he had, by the alterations introduced, made a valid disposition of his estate to the new trustees; and that he had no design to alter his will, except so far as such obliteration and interlineation could effectuate that purpose, by substituting the persons whose names he interlined in the stead of him whose name was struck out. If such be the case, and so it appears to us, the testator meant no revocation, but by means of that which he, through mistake, supposed to be a valid disposition to others; and had no intention to revoke, by the obliteration he has made, but by an effectual substitution, meant to be made of others in the room of him whose name was so obliterated; and if so, this case must be governed by that of Onions v. Tyrer, 1 P. Wms. 343, where the intention of the testator not being to revoke his first will by cancelling, but by substituting another perfect will in lieu thereof, Lord Chancellor Cowper, on the same ground, set up a like devise, and held a cancellation of the first will to be no revocation. But in this case it has been further argued for the defendants, that supposing the obliteration of the name of Spillman to have revoked the devise to him, the heir at law cannot recover, inasmuch as the devise to Aldridge remained unrevoked, and we think there is great weight in this argument; and that there are grounds on which it may be contended, that the effect of the obliteration in this case is, at most, to revoke only the devise as to Spillman, the one devisee in trust whose name is so obliterated,

ante, § 21.

leaving it unrevoked as to Aldridge: the interlineations which were intended to add other trustees, being for want of a proper publication, inoperative: and therefore giving its full effect to that obliteration, it would leave the devise to Aldridge in full force, and competent to sustain all the trusts of the will, in exclusion of the heir at law.

Cancelling one part revokes the other.

37. Where there is a duplicate of a will, and the testator cancels the part which is in his own possession, though the other remain entire, yet it will be a revocation of the whole will. For the original and duplicate being but one will, they must stand or fall together; and it may not be in the testator's power to get possession of the duplicate.

2 Vern. 742. 1 P. Wms. 346. Burtenshaw v. Gilbert, infra, c. 7.

Of implied Revocations.

38. Besides the different modes of revoking a will allowed by the statute of frauds, certain alterations in the situation of the testator, or in the estate devised, have been held to be implied revocations of a will.

Marriage and Birth of a Child.

39. It is now fully established that marriage, and the birth of a child, operate as an implied revocation of a will.

Christopher v. Christopher, 4 Burr. 2182.

40. A person made his will in the time of a former wife, who died without having had any children; and afterwards married a second wife, by whom he had issue the plaintiff. The Court of Exchequer held that the second marriage, and the having issue by that marriage, was a revocation of the will.

Spragge v. Stone, Doug. 35. Amb. 721.

41. A person made a will in Jamaica, in the year 1764, by which he devised his real and personal estate to the defendant. Afterwards he made another will in England, not duly attested, by which he devised his real and personal estate to his wife, in trust for his son. The Chancellor of Jamaica decreed that the marriage and birth of a child, and the

second will, amounted to a revocation as to the personalty, but not as to the real estate.

On an appeal to the Privy Council, Lord Ch. J. De Grey, Lord Ch. B. Parker, and Sir Eardley Wilmot being present, so much of the decree as established the first will, with respect to the real estate, was reversed. And it was declared, that the subsequent marriage and birth of a child were, in point of law, an implied revocation of the first will.

42. Marriage and the birth of a child do not however in all cases amount to an implied revocation of a will; for these facts only afford a presumption that the testator had changed his intention; so that where this presumption is rebutted by other circumstances, the rule will not hold.

Browne v. Thompson, 1 Ab. Eq. 413.

43. A bachelor made his will, by which he gave a legacy of 500 *l.* to his brother, and legacies to other persons, and devised his real estate to Eliza Close and her heirs. The testator afterwards married Eliza Close, and died without altering his will; leaving her pregnant of a son. The question was, whether this alteration in the testator's situation operated as a revocation of his will. Lord Keeper Wright was clearly of opinion, that an alteration of circumstances might amount to a revocation of a will of lands, as well as of personal estate, notwithstanding the statute of frauds, which does not extend to an implied revocation. But that no such alteration appeared here, for no injury was done to any person; and those were provided for, for whom the testator was most bound to provide; and established the will.

Brady v. Cubitt, Doug. 31.

44. Lord Mansfield has said, that as marriage and the birth of a child only amount to an implied revocation of a former will, these may be rebutted by

every sort of evidence, even parol evidence; and there was no case in which a marriage and the birth of a child had been held to raise an implied revocation, where there had not been a disposition of the whole estate.

45. It has been held by Lord Eldon, that a second marriage and the birth of children, the wife and children being provided for by settlement, and there being children by a former marriage, was a case of exception from the rule that marriage and the birth of a child revoke a will. Ex parte Ilchester, 7 Ves. 348.

46. It was determined in a modern case, that marriage and the birth of a posthumous child operated as a revocation of a will of lands, made before marriage.

47. A person being a bachelor, devised lands to his nephew, and afterwards married. Upon his wife's becoming pregnant, he expressed an intention to revoke his will, and gave directions to an attorney to prepare another will; but died before it was ready. After his death his widow was delivered of a child, who brought an ejectment against the devisees. Doe v. Lancashire, 5 Term R. 49.

Lord Kenyon said, it had been solemnly decided that marriage and the subsequent birth of a child amounted to a revocation of a will, made before marriage. Perhaps the foundation of that principle was not so much an intention to alter the will, implied from those circumstances happening afterwards, as a tacit condition annexed to the will itself, at the time of making it, that the party did not intend that it should take effect, if there should be a total change in the situation of his family. He cited a passage from Justinian's Institutes, and one from Vinius's Comment, to show that by the civil law, if the wife was pregnant, and a posthumous child was afterwards

born, the will was utterly destroyed. And this confirmed the idea that these decisions did not proceed on the intention of the party, but on a tacit condition annexed to the will itself when made. That our law also took notice of posthumous children. For these reasons therefore, standing on former decisions, and not extending them beyond the rule established and incorporated into our law, he was of opinion for the plaintiff. But disclaimed paying any attention to the declarations of the husband, because letting in that kind of evidence would be in direct opposition to the statute of frauds; which was passed in order to prevent any thing depending either on the mistake or the perjury of witnesses. But when the act intended to guard against frauds and perjuries, it left the courts at liberty to take into consideration those circumstances which are not liable to prevarication.

Mr. Just. Buller said, the only question was, whether a child in *ventre sa mere*, be or be not in the same situation as a child actually born, and that there was no distinction between them. That he had looked into the Register's book for the case of Browne v. Thompson, where it did not appear that the child was born during the parent's life. That that case was first heard before the Master of the Rolls, who decreed a revocation of the will; though that decree was afterwards reversed by Lord Keeper Wright, from the peculiar circumstances of the case. They must take it that in that case the child was not born during the devisor's life; if so, the opinion of the Master of the Rolls went the full length of deciding the case: and he agreed that that opinion was sound law. The Court was unanimous that the will was revoked.

ante, § 43.

48. Although it be fully established in the preceding cases, that marriage, and the birth of a child, operate as an implied revocation of a man's will; yet it has never been decided that either of those circumstances singly, as a subsequent marriage, or the subsequent birth of a child, will have that effect. Treat of Eq. B. 4. P. 1. c. 2. Jackson v. Hurlock, Amb. 487.

49. J. Pierson devised all his real estates to a trustee, in trust to pay an annuity to Mary Simpson, and in case he should have any children by her, to provide for their maintenance, and to raise 3000*l.* for them: at the time of making the will the testator had one child by M. Simpson; afterwards he married her and had three children, and died without altering his will. Kennebel v. Scrafton, 2 East, 530.

It was held that the will was not revoked by the subsequent marriage, and birth of children; because there was not that total change in the situation of the family, and that total destitution of provision for those who ought to be the objects of the testator's care and protection (although the provision was made for them under a different character), which could vacate the will on the ground of a supposed tacit condition, that it should be void upon a total change in the situation of the testator's family, and a total want of provision for the family so newly circumstanced; or upon the ground of a presumed intention to revoke, according to any rules of law hitherto recognized on this subject. 1 Ves. & B. 465.

50. It has been determined lately, that where a widower, having a son and two daughters, made his will, by which he gave all his real estate in trust for those children, and afterwards married, and had other children, his will was not thereby revoked. For such revocation would operate only to let in the eldest son to the whole of the estate, which he had by the Sheath v. York, 1 Ves & B. 390.

will divided between that eldest son, and the other children of the marriage.

A Woman's Will revoked by Marriage. Forse v. Hembling, 4 Rep. 61. 2 P. Wms. 625. Hodsden v. Lloyd, 2 Bro. R. 534.

51. The marriage of a woman operates as a revocation of a will made by her prior to such marriage for if the wife dies before her husband, it can have no operation. The making of the will being only the inception of it; as it does not take effect till the death of the devisor. But if in a case of this kind the wife survives her husband, the will is revived, and takes effect as if she had never been married.

Alteration of the Estate.

52. It was established as a rule, long before the statute of wills, that any alteration of the estate in lands devised, by the act of the devisor, after the publication of his will, operated as an implied revocation of such will. This doctrine is founded on three reasons: 1°. On the favour which the law shows, in every instance, to the heir. 2°. On a principle already stated, that a devisor must not only be actually seised of the lands, at the time when he makes his will, but must also continue to be so seised thereof, till the time of his death; and, 3°. Because any alteration of the estate devised, is held to be evidence of an alteration in the intention of the devisor.

ante, c. 3. § 31.

Alienation to a Stranger. 1 Roll. Ab. 615, 16.

53. An actual sale or disposition of the estate by the devisor, after he has made his will, operates as a revocation; for in such case the testator does not die seised; and his alienation is undoubted evidence of an alteration of intention, in conformity to the rule of the civil law, from which this doctrine was probably derived; *est enim rei legatæ alienatio species tacitæ ademptionis, quoniam hoc ipso, quod testator rem in alium transfert, recedere a priori voluntate videtur.*

Vin. ad Inst. Lib. 2. tit. 20. § 12.

54. A person devised all his manors, messuages, and hereditaments to trustees, in trust for his nephew and his issue, in strict settlement. The testator afterwards conveyed an advowson, whereof he was seised at the time of making his will, to trustees and their heirs, and by another deed declared the trust of that conveyance to be to present the son of R. I.

Sparrow v. Hardcastle, Amb. 224. 3 Atk. 799.

It was decreed by Lord Hardwicke that the conveyance of the advowson was a complete revocation of the devise of it.

55. Eliz. Milner devised a house to her sister Catherine for life, and after her decease, devised the same to trustees, in trust to sell. The testatrix afterwards sold the estate herself. It was decreed that the sale was a revocation, not only of the house, but also of the devise of the money to arise from the sale.

Arnold v. Arnold, 1 Bro. R. 401.

56. Even an agreement or covenant to convey lands, which have been previously devised, will operate in equity, though not at law, as a revocation of such devise.

Contract for Sale.

57. A person devised six houses to his wife; afterwards the testator, by articles, covenanted, in consideration of the marriage of his eldest daughter, to settle a moiety of his real estate on her. Lord King held, that though this was but a covenant, and therefore did not, at law, revoke the will; yet it being for a valuable consideration, was, in equity, tantamount to a conveyance; and consequently a revocation of the will.

Rider v. Wager, 2 P. Wms. 328.

Knollys v. Alcock, 7 Ves. 558.

58. In a subsequent case it is said by Lord King, that though a covenant or articles do not, at law, revoke a will, yet if entered into for a valuable consideration, amounting in equity to a conveyance, they must consequently be an equitable revocation of a will.

Cotter v. Layer, 2 P. Wms. 622.

Knollys v. Alcock, 5 Ves. 648.

59. In a modern case Lord Rosslyn held, that an agreement for a partition operated as a revocation of a devise; and said, that where an estate was devised specifically, and was afterwards sold by the testator by a contract executory, the estate went from the devisee. And Sir Wm. Grant held, that a covenant to surrender copyhold estates operated as a revocation in equity of a prior will.

Vawser v. Jeffrey, 16 Ves. 519.

2 P. Wms. 626.

60. In cases of this kind, the legal estate passes to the devisee by the will, but he is bound to convey it to the person claiming under the equitable agreement.

An intended Alienation.

61. Even an intended alteration of an estate previously devised, which fails of taking effect, for want of some formality in the instrument, has been held to operate as a revocation. Thus a feoffment without livery, and a bargain and sale not enrolled, have been held to be revocations of prior devises; because such intended alienations were considered as proofs of an alteration of intention.

1 Roll. Ab. 615. 3 Atk. 73. 803.

Shove v. Pincke, 5 Term R. 124.

62. It was certified by the Court of King's Bench to the Court of Chancery, in a modern case, that a deed intended to operate as an appointment to uses, but not sufficient for that purpose, may have the effect of revoking a will, if the party appear to have had that intention.

Alienation to the use of the Testator.

63. An alienation to a trustee, without any intention of departing with the estate, and though the alienor take back the old use, has been held to operate as a revocation of a prior devise: because in such cases there is an interruption of the seisin; and also because a presumption in favour of the heir at law arises from the alienation, that there was an alteration in the intention of the testator.

Dyer, 143 *b.*

64. Thus it was determined in Michaelmas, 44 Edw. III., that where a man seised in fee of

lands, devisable by custom, made his will, he having then two sons, and upon their death, aliened the land in fee, and took back an estate in fee; the will was thereby revoked.

65. Lord Lincoln made his will, by which he devised all his estates to the person to whom his title was to descend: afterwards conceiving that he should marry a certain lady, though the lady never had any such intention, he conveyed his estate by lease and release to trustees, in consideration of his intended marriage, to the use of himself and his heirs, until the marriage should take effect, and then, as to part, for his intended wife, &c. No marriage ever took place, and Lord Lincoln died.

Lincoln's Case, 1 Ab. Eq. 411. Show. Parl. Ca. 154.

It was decreed that this conveyance operated as a revocation of the will: and the decree was affirmed in the House of Lords. It is said that the Judges were equally divided in this case; and that all the Lords voted. Lord Mansfield has said of it,—"The absurdity of Lord Lincoln's case is shocking; however, it is now law."

3 Atk. 803. 4 Burr. 1940. Doug. 695.

66. A. by his will, dated in 1708, gave several pecuniary and specific legacies, and then gave all his real and personal estate to B., on condition he took the name of A. Afterwards A. together with J. S. his trustee, by lease and release, conveyed several manors to trustees and their heirs, to the use of himself for life, and that the trustees and their heirs should execute such conveyances thereof as A. by writing under his hand and seal, or by his last will, should appoint. The testator died without altering or revoking his said will, or making any appointment touching his real estate.

Pollen v. Huband, 1 Ab. Eq. 412. 7 Bro. Parl. Ca. 433.

It was decreed that the lease and release was a revocation of the will; and the decree was affirmed in the House of Lords.

Alienation to strengthen the Devise.

67. An alienation made for the sole purpose of strengthening or giving effect to a previous devise, has notwithstanding been held to operate as a revocation; on account of the interruption of the seisin; for in such a case no alteration of intention could be presumed.

Hussey's Case, Moo. 789. 1 Roll. Ab. 614.

68. A bastard made his will, and thereby devised a certain manor. He afterwards made a feoffment of the same manor, to the use of such persons, and for such estates, as he had already declared by his will. It was adjudged that this feoffment was a revocation of the will.

Lutwich v. Mutton, 1 Roll Ab. 614.

69. A person covenanted by indenture to levy a fine, to the use of such persons as he should nominate by his will. He then made a will, by which he devised the lands to certain persons; and afterwards levied a fine in pursuance of the covenant. It was agreed that the fine operated as a revocation of the will; but in this and the preceding case, the will was held to be a good declaration of the uses of the fine.

Hicks v. Mors, Amb. 215.

Tit. 32. c. 12. § 6.

Fine and Recovery.

70. Where a person who has made a will of his lands, afterwards levies a fine, or suffers a recovery of them; these acts will operate as a revocation of the will.

Dister v. Dister, 3 Lev. 108.

71. A tenant in tail made his will, whereby he devised certain lands; and afterwards, by bargain and sale enrolled, conveyed the same to a tenant to the *præcipe*, against whom a common recovery was suffered, with voucher of the tenant in tail, to the use of himself in fee. It was determined that the recovery operated as a revocation of the will.

Marwood v. Turner, 3 P. Wms. 163.

72. Sir H. Turner being seised of a considerable estate in tail male, with remainder to himself in fee, and having no son, made his will, by which he devised his estate to his nephew, (who was not his heir,) in

strict settlement. Afterwards Sir H. Turner suffered a common recovery of this estate, to the use of himself in fee. Upon the back of the will was written, *this is my will;* and afterwards, *but not now so intended.*

It was determined that the recovery, and the declaration of the uses of it to Sir H. Turner and his heirs, being subsequent to the will, and inconsistent therewith, as declaring the estates should go to his heir at law, and not to his devisee, operated as a revocation of the will. And it was observed that a common recovery, as it is a solemn conveyance upon record, and stronger than a feoffment, must needs be a revocation: the recovery being suffered by the tenant in tail, plainly gains an absolute fee, derived out of the estate tail, and which fee was never devised; consequently it must be even stronger than the case where a man, having lands, devises them, and afterwards makes a feoffment of them; though to the use of himself and his heirs, and though this be the old use, yet according to the several cases in 1 Roll Ab. 614., it is a revocation; and the case of Dister v. Dister was cited as exactly in point.

73. It was agreed by marriage articles, that the wife's estate, whereof she was tenant in tail, should be conveyed to the husband in fee. Subsequent to the marriage, the husband devised those lands, and afterwards the husband and wife suffered a recovery of them, to such uses and for such estates as they should jointly appoint; and in default of appointment, to the use of the husband and his heirs. No appointment was made. Parsons v. Freeman, 3 Atk. 741.

It was decreed by Lord Hardwicke, that the will was revoked by the recovery. And he said,—"It is admitted that if the testator had been seised in fee, MS. Rep.

at the date of the will, and had afterwards suffered a recovery, that would have been a revocation; and yet the objection would have held equally there, of the alteration being made only for the particular purpose to enable him and his wife to dispose, without any other form of conveyance. There are a great variety of cases, and nice and artificial distinctions, upon the favour to the heir: one rule however is certain, that if a man is seised in fee, and disposes by will, and afterwards makes a conveyance, taking back a new estate, that is a revocation. So if he devises the land, and levies a fine without any use declared; this is a revocation; and yet he takes back the old use unaltered; which is a prodigious strong case."

Darley v. Langworthy, Amb. 653. 3 Wils. R. 6.

74. Vincent Darley being seised of several real estates for his life, with the reversion in fee in himself, made his will, by which he devised them to Mr. Langworthy in strict settlement; some years after, the testator suffered a common recovery of the estates devised, to the use of himself in fee.

The question was, whether the will was revoked by the recovery. The Court of Chancery ordered a case to be stated for the opinion of the Court of Common Pleas, upon the following question:—"Whether the deed executed, and the recovery suffered by Vincent Darley, was a revocation of the will."

The case having been fully argued before that Court, Lord Ch. J. Wilmot said, there were a great many determinations touching the revocation of wills, and very nice artificial distinctions were made in favour of heirs at law. It seemed to be clear, from the latest determinations upon the subject, that if a man seised in fee, made his will and devised; and afterwards conveyed by recovery, fine, feoffment,

release, &c., and took back the same, or a different estate, it should amount to a revocation. The reason was, that it must be presumed he intended to alter his will.

The Court certified their opinion, that the deeds executed and the recovery suffered by Vincent Darley, were a revocation of his will. Lord Camden decreed accordingly; and the House of Lords affirmed the decree, as to this point. 3 Bro. Parl. Ca. 359.

75. In the case of Selwin v. Selwin, which has been stated in a former chapter, the will, though made before the return day of the writ of entry, on which the recovery was suffered, and to which it had relation, was held not to be revoked by the recovery; because the bargain and sale and recovery ought to be considered as one transaction, and as constituting one whole, by reference to its inception. ante, c. 3. § 23. Tit. 36.

76. It was held by the Court of Common Pleas, upon a motion for a new trial, that where a testator levied a fine to such uses as he should appoint, by deed or will; a prior will was thereby revoked. Doe v Dilnot Bos. & Pull. N. R. vol. 2. 401.

77. The doctrine of presumptive revocations appears to have been carried much too far, and has been disapproved of by the ablest Judges of modern times. Lord Mansfield has observed —" That constructive revocations, contrary to the intention of the testator, ought not to be indulged; and that some overstrained resolutions of that sort had brought a scandal on the law." And on another occasion he said,—" All revocations which are not agreeable to the intention of the testator, are founded on artificial and absurd reasoning." It is however now fully settled, that wherever a person who has devised an estate, afterwards makes any alteration in it, by any mode of conveyance whatever, inconsistent with the Any Conveyance inconsistent with the Devise. 3 Burr. 1491. Doug. 722. 2 Hen. Black. Rep. 523.

preceding devise, or by which the estate becomes in any respect different from what it was before; such an alienation will operate as a revocation of the prior devise.

Brydges v. Chandos, 2 Ves. Jun. 417.

78. By articles made in 1777, previous to marriage, the Duke of Chandos covenanted, that he would, within six months after the marriage, cause several freehold and copyhold estates to be conveyed to him, to the intent that the duchess might become entitled to dower thereout; and also that he would, within twelve months after the marriage, and after such conveyances, settle the said estates, subject to dower, to the use of himself for life, remainder to trustees to preserve contingent remainders; remainder, after the decease of the duke and duchess, to other trustees for a term of years, to raise portions for younger children; remainder to the first and other sons of the marriage in tail male; remainder to the right heirs of the duke. The marriage took effect; and the duke by his will, dated January 9th, 1780, confirmed the articles, and devised all the estates which he had agreed to settle, in case of failure of issue male of the marriage, to the duchess for life; remainder to his daughters, as tenants in common in tail, with several remainders over.

Afterwards (in October 1780,) the duke executed a settlement, purporting to be in pursuance and performance of the articles, by which he granted and released all the estates comprised in the articles to trustees, to the use of himself for life; remainder, as to part, to the use of the duchess for life; and as to another part, for securing a jointure of 2,000*l.* a year to the duchess; remainder to trustees for a term of 1,000 years, to secure portions for younger children, nearly as in the articles; remainder to the first and

other sons of the marriage, remainder to the duke in fee. Lord Loughborough said, that a court of equity could not adopt different rules respecting the transmission of estates, from those established at law. That the settlement being in many points inconsistent with the articles, and also with the will, must be deemed a revocation of the will.

On an appeal to the House of Lords, the following reasons were assigned in support of the appellant: 1°. Because the settlement being executed in consequence of the articles by which the duke was bound to make a conveyance of his estates, ought not to be considered as a distinct and independent deed, but as forming part of the same conveyance with the articles, which bore date antecedent to the will; and therefore could not be deemed a revocation of it. 2° Because, by expressly referring to the articles, and professing to carry them into effect, the settlement clearly marked and defined the object which the parties had in view, and excluded every possible idea of an intention to revoke the will; and though the rule were generally true, that any conveyance after the execution of a will, whereby the nature of the estate which the devisor had in him at the time of making the will was altered, operated as a revocation of such prior will; yet it was submitted that such rule did not apply at all to a case circumstanced as the present; or if it did, that there were many exceptions to that rule, grounded on the nature and tendency of the conveyance, with reference to the intention of the testator, manifested thereby. If the principle of revocation was founded merely on the alteration in the plight of the estate, it could admit of none of those exceptions which had actually been adopted in the case of con-

7 Bro. Parl. ca. 505.

veyances in fee, by way of mortgage, or in trust for payment of debts or particular charges subsequent to the execution of a will, and which had been held only a revocation *pro tanto*. These depended entirely on the nature and design of such conveyances; and if so, the settlement in question appeared to fall directly within the same principle. 3^rly. Because the duke's will referred in express terms to the articles, and disposed only of such estates and interests as were not bound thereby; and it seemed unreasonable to say, that a deed for carrying those articles into effect, and which the duke must have had in contemplation at the time of making his will, should totally revoke the dispositions contained in that will; although made with reference to ulterior objects, not within the articles or deed.

infra.

In support of the decree, the following were some of the reasons assigned. Because the testator, after making his will, conveyed and departed with the whole of the estate which he had, in the lands comprised in those deeds, at the time of making his will, and passed that estate to others in fee, declaring the use to himself for life, with limitations thereon, and limiting the ultimate use to himself in fee simple; and it had been settled, by a series of decisions, which could not be impeached without destroying all security of title, that the conveyance of the entire fee simple of lands to uses, was a revocation of a prior will of such lands; and that the use limited to the grantor himself by such conveyance would not pass by such will, without a republication thereof, but would descend to his heir at law; except in certain cases, bounded by certain rules.

It had been contended, that though the settlement was a revocation at law, it was not so in equity: or

that in equity the devisees had a right to make the heir a trustee for them. Lord Hardwicke, in Parsons v. Freeman, had said, and the rule was unquestionably established, that the same conveyance which would be a revocation of a devise of a legal estate, would be equally a revocation of a devise of an equitable estate; and that it would be very dangerous to property to hold it otherwise. If, therefore, the conveyance in question was a revocation of the devise at law, what equity could there be to set up the revoked legal devise, against the heir, in favour of the devisee; or for declaring the heir a trustee for the devisee; which would be in effect to convert what was a legal devise, into an equitable devise, merely because it was revoked; and therefore of no force as a legal devise. 3 Atk. 748.

The decree was affirmed.

79. Sir Thomas Cave, by articles dated December 13th, 1790, entered into previous to his marriage with Lady Lucy Sherrard, agreed to make a provision for his intended wife, and the issue of the marriage, out of certain estates. Sir Thomas Cave made his will, dated March 13th, 1791, by which he devised his estates, in case he should die without issue of his body, to his uncle, the Rev. Charles Cave, and his issue male, in strict settlement. Afterwards, by deeds of lease and release, dated in May 1791, reciting the intended marriage, and that Sir T. C. had agreed, upon the treaty for the said marriage, to settle a jointure upon Lady Lucy, in consideration of the marriage and of the fortune of Lady Lucy, he conveyed the estates in question to trustees and their heirs, to the use of himself for life, remainder to the intent that Lady Lucy might receive an annuity of 600*l.* a year for her life, as a jointure, and in bar of Goodtitle v. Otway, 7 Term R. 399.

dower; remainder to the use of the first and other sons of the marriage, in tail male; remainder to Sir T. C. his heirs and assigns for ever. And by other deeds of lease and release Sir T. Cave conveyed other estates to trustees and their heirs, to the intent that Lady Lucy might receive an additional jointure, with a limitation to trustees for 500 years, for better securing it, with remainder to the use of Sir T. Cave in fee. The marriage took place, and in about six months Sir T. Cave died, without issue; leaving Sarah Otway his heir at law. A question arose in a suit in Chancery, between the devisee and the heir at law of Sir T. Cave, whether the first and second deeds of lease and release operated as a revocation of the will.

By consent, the parties were ordered to proceed to a trial at the bar of the Court of Common Pleas, where a special verdict was found stating, the above facts. The judges delivered their opinions *seriatim* on the special verdict, and were unanimous, that the first deeds of lease and release operated as a revocation of the will, as to the lands comprised therein. And three of the judges thought the second deeds of lease and release had the same effect; but Lord Chief Justice Eyre was of opinion, that they did not operate as a revocation.

Vide 1 Bos. and Pull. 576.

A writ of error was brought from this judgment in the Court of King's Bench, when Lord Kenyon began by observing, that the marriage settlement executing the articles, and on which the principal question depended, limited the reversion *in fee to* Sir T. C. his heirs and assigns for ever; therefore the whole use was disposed of some way or other. He then stated the cases of Parsons v. Freeman, and Sparrow v. Hardcastle; and observed, that the doc-

ante.

trine which Lord Hardwicke wished to establish, was this; that any alteration of the estate, or conveyance to uses, after making the will, though the old use remained, which was the case here, was in law a revocation of the will. That supposing in this case Sir T. C. had merely made a conveyance to the use of himself and his heirs for ever, that would undoubtedly have operated as a revocation of his will; then could the other uses to which he conveyed the estate make any alteration. He said it had been supposed in the course of the argument, that the case of Brydges v. Chandos proceeded on equitable principles; but he knew that the Lord Chancellor meant by that decision to confirm the doctrine established by Lord Hardwicke. He concluded by saying, "I do not enter into the reasons upon which all the cases have been determined; because the best rule is *stare decisis*. But my opinion is formed upon the authority of all the cases from the time of Lord Rolle. Such were the opinions of Lord Trevor, Lord Hardwicke, and Lord Mansfield; the latter of whom, though finding fault with former decisions, thought himself fettered by the authorities. I take it therefore that the law of the land is now clearly and indisputably fixed, if at any time it can be fixed; that where the whole estate is conveyed away to uses, though the ultimate reversion of it comes back again to the grantor by the same instrument, it operates as a revocation of a prior will. That being the law, I am bound, how unfortunate soever it may be in this case, to give my opinion in favour of the defendant; and consequently the judgment of the Court of C. B. must be affirmed."

The cause coming on again in the Court of Chancery upon the equity reserved, the Court was 3 Ves Jun. 682.

Vawser v. Jeffrey, 16 Ves. 519. Vide 7 Bro. Parl. Ca. 593.

clearly of opinion, that the will was revoked in equity, as well as at law, and decreed accordingly. And on an appeal to the House of Lords, the decree was affirmed.

Att. General v. Vigor, 8 Ves. 256. Rawlins v. Burgis, 2 Ves. & Bea. 382.

80. It was resolved in a modern case, that a devise was revoked by an exchange; though the land, after the death of the devisor, was restored to his heir, under an arrangement, in consequence of a defect discovered in the title of the other party to the exchange.

Parol Evidence not admissible.

81. In the case of a revocation, by the execution of a conveyance of lands, subsequent to a devise of them, parol evidence is not admissible to prove that the testator meant his will should remain in force, and unrevoked by the subsequent conveyance.

2 Ves. Jun. 606.

82. In Goodtile v. Otway, the plaintiff went into evidence, in the Court of Chancery, of the testator's conversations with his lady and the attorney who prepared all the instruments, to show the motives for making the will; and that the testator had no intention to revoke it; and after the marriage referred to it as his will. But the Lord Chancellor was clearly of opinion, that the parol evidence, being evidence of a republication, if any thing, could not be received. That if the deed did not affect the will at law, it was out of the question; if it did, he could not set up the will again by parol evidence.

2 H. Black. 516.

83. Upon the trial at bar of the above case, in the Court of Common Pleas, the same evidence was offered; but the Court refused to admit it.

Lord Chief Justice Eyre said, it was manifest from the opening, that it was intended to be insisted on, that by the necessary operation of the conveyances used, Sir T. C. lost his old estate, upon which the will operated, and took a new one. If so, the con-

sequence was, that though there were the clearest demonstration that it was his intent, that the will should operate upon it, the law said it should not; and by that law they were bound. If this was a case of that kind, it was a case that would disappoint the will, even admitting the clearest intention that it should not. All evidence therefore of intent seemed to him entirely foreign to the question; all such evidence therefore must be rejected; and the question tried upon its true legal grounds.

Mr. J. Buller observed, that in order to determine whether the evidence was or was not admissible, the Court was to consider to whom it was to be applied. If the question was, whether the testator was incapacitated, or the instructions given were duly followed, the evidence would be admissible. But here the end proposed by it was, to show that the deeds should have a different construction from that which the words imported. That there was a great difference between cases which depended on circumstances, and those which depended on the solemn acts done by the party himself; and that distinction supported the case of Brady v. Cubitt. ante. There was no act in that case done by the testator, importing that he meant to revoke his will, or change it any respect; but changes having happened in his family by marriage, and the birth of a child, there was a presumption of revocation; and therefore it was to answer that presumption, that the Court received parol evidence. But he could not find, from any one case quoted at the bar, that the Court had received parol evidence in the case of a deed executed by the party himself, with a view of altering the construction of the instrument.

A Fraudulent Conveyance is not a Revocation.

84. A conveyance obtained by fraud will not operate as a revocation of a prior devise; because, when such a conveyance is set aside, it is considered as a mere nullity.

Hawes v. Wyatt. 3 Bro. R. 156. vide 6 Ves. 215. 8 Ves. 283. 2 Cox R. 263.

85. Francis Hawes being seised of a reversion in fee, subject to the life interest of his father, made his will, and thereby disposed of it. The testator's father afterwards obtained from him a conveyance of his reversion by fraud. The Court of Chancery having directed the deed to be delivered up, to be cancelled, said it was no deed; and therefore could not operate as a revocation of the will.

Wright v. Littler, 3 Burr. 1244.

Nor an Alteration of the Quality of the Estate.

86. A mere alteration of the quality of an estate, without any intention of varying the quantity of the interest, or the disposing power of the owner, will not operate as a revocation.

1 Roll. Ab. 616. pl. 3.

87. Thus where a man having feoffees to his use, before the statute 27 Hen. VIII., devised the lands to another, and afterwards the feoffees made a feoffment of the land to the devisor; it was agreed that this feoffment did not operate as a revocation of the devise: for after the feoffment, the devisor had the same use as before.

3 Atk. 749.

88. It follows from this case, that the acquisition of the legal estate alone, will not operate as a revocation of a devise. Thus Lord Hardwicke has said, that where a man has an equitable interest in fee in an estate, and afterwards takes a conveyance of the legal estate, to the same uses; this is no revocation.

Williams v. Owens, 2 Ves. Jun. 595.

89. G. Jones by articles, in consideration of marriage, covenanted to convey all his real estates to trustees, to the use of himself for life, remainder in trust to secure an annuity to his intended wife for life, remainder to the first and other sons of the marriage in tail, re-

mainder to the daughters in the same manner, remainder to his own right heirs. Some time after, G. Jones devised all his real estates, upon condition that he should have no issue, to his wife for life, with several remainders over. Afterwards, by indentures of lease and release, G. Jones, in pursuance of the said articles, and in consideration of the said marriage, bargained, sold, and confirmed to trustees and their heirs, all his said real estates, to hold to certain uses and trusts, which were exactly the same as those expressed in the articles.

Sir R. P. Arden, M. R. said, the simple question was, whether a man having an equitable estate, devising it, and taking to himself afterwards nothing more than the legal interest in that, in which he before had the equitable, has by that simple act, going no farther, not modifying it, nor passing to the devisee any thing more than what was before given, revoked his will. He did think that had been decided, both in principle and in precedent; but he was not sure one of the counsel was not right in saying, it had not been exactly decided. But cases seemed to have been taken for granted at least, which completely proved it. It was stated by Lord Hardwicke in Parsons v. Freeman, and repeated by him in Sparrow v. Hardcastle, in which this question, as to the effect a subsequent deed would have upon a will, was much discussed; that taking the legal estate, after a devise of the equitable interest, was no revocation; and it was admitted by Lord Loughborough in Brydges v. Chandos. Lord Hardwicke not only admitted, but seemed to consider it as decided and acted upon: if so, the case was determined, for this was nothing more than taking the legal estate exactly in the same manner as he was before seised of the

ante.
3 Atk. 798.

equity. In Parsons v. Freeman, which he had looked into very attentively, Lord Hardwicke established this principle, that wherever the estate is modified in a manner different from that in which it stood at the time of making the will, there is a revocation; but wherever the testator remains with the same estate and interest exactly, and disposable by the same means, without any fresh modification, there is no revocation, and the testator will be taken to have passed to the devisee the same interest he acquired, though the one may be legal, the other equitable.*

Vide Harmood v. Oglander, 6 Ves. 199.

Upon the whole he considered that the devisor had nothing but the reversion in fee; that his acquiring the legal interest made no difference; and that the person to whom the estate was conveyed, was a trustee for the purposes of the will.

90. It has been determined upon the same principle, that where a person devised a copyhold estate, and was afterwards admitted to it; this did not operate as a revocation of the devise.

Roe v. Griffits, 4 Burr. 1952.

91. B. North being seised in fee of a copyhold estate, surrendered the same, in consideration of marriage, to the use of himself and his heirs, till the solemnization of the marriage; then to his own use for life, remainder to his intended wife for life, remainder to the children of the marriage, remainder to the said B. North in fee. The marriage took effect, and the next year, 1725, B. North surrendered the premises to the use of his will. In 1743, B. North made his will, by which he devised his copyhold estates to his

* In the cases of Brydges v. Chandos, and Goodtitle v. Otway, the conveyances did not pursue the articles, but went beyond them.

wife in fee. In the year 1751, B. North was admitted to the uses of the marriage settlement.

It was resolved by the Court of King's Bench, that this admission did not operate as a revocation of the will.

92. In consequence of this doctrine it is held, that the mere change of a trustee does not operate as a revocation of a devise. Nor the Change of a Trustee.

93. W. Watts devised all his real estates to trustees upon certain trusts; he afterwards made a codicil, reciting that, since the publication of his will, he had contracted for the purchase of certain lands; and thereby directed the trustees and executors named in his will to pay the purchase money; and that the said purchased premises should be conveyed to the same uses as he had declared concerning his other estates. Afterwards the testator himself completed the purchase, and took a conveyance of the estates to trustees, in trust for himself and his heirs. The question was, whether the conveyance of the new purchased lands to the trustees, subsequent to the codicil, was not a revocation; the testator, at the time of making the codicil, having only a trust estate, and the vendor being a trustee for him; so that, before his death, the legal estate was conveyed to other trustees. Watts v. Fullarton, Doug. 718.

Lord Bathurst decreed there was no revocation; relying much on the general proposition laid down by Lord Hardwicke in Parsons v. Freeman. ante.

94. Sir J. Gibbon having mortgaged his estates in fee, made his will, by which he devised them. Afterwards he paid off the mortgage, and took a conveyance of the estate to a trustee for himself. The Court of King's Bench held, that this being no Doe v. Pott, Doug. 709.

more than a bare change of a trustee, the will was not revoked.

Nor a Partition.

95. A partition between tenants in common does not operate as a revocation of a prior devise; even though such partition be corroborated by a fine.

Risley v. Baltinglass, T. Raym. 240.

96. One Temple and two others were tenants in common; Temple made his will in writing of his third part; afterwards, by indenture and fine, a partition was made between the tenants in common; and if this partition was a revocation of the will, was the question.

Webb v. Temple, 1 Freem. 542.

It seemed to all the Barons, Montague, Littleton, Thurland, and Bertie, that it was not any revocation. But judgment was not given, because the plaintiff obtained leave to discontinue his action.

Luther v. Kirby, 8 Vin. Ab. 148. 3 P. Wms. 169.

97. Dorothy Kirby, by her will, taking notice that she was tenant in common with another person, devised her moiety to trustees. She afterwards, by indenture between her and the other tenant in common, covenanted to levy a fine of all the premises, and declared the uses thereof, as to certain farms, &c., being one moiety, to Dorothy Kirby and her heirs; and as to the other farms, &c. being the other moiety, to the other tenant in common and her heirs; and a fine was levied accordingly. A question having arisen whether this deed and fine operated as a revocation of the will, the Lord Chancellor referred it to the Judges of the Court of King's Bench; who certified their opinion, that they were not a revocation; with which the Chancellor agreed, and decreed accordingly.

98. But where a partition is made, and a fine is levied, not merely to establish the partition, but also for another purpose, and the estate in the land is altered; it will then operate as a revocation of a former devise. Unless it extends to other Things.

99. Henry and Robert Tickner being seised of an estate in gavelkind, Robert devised his undivided moiety to his wife in fee; afterwards, by deed of partition and fine, all the gavelkind estate which Robert had devised, was allotted entirely to Robert; to such uses as he should appoint, and in default of appointment, to him in fee. Lord Ch. J. Lee, after mature deliberation, held this transaction to be a revocation of the will. Tickner v. Tickner, cited 3 Atk. 742. Vide 7 Ves. 564. 8 Ves. 281. 10 Ves. 249.

100. A conveyance to revoke a will, must be of the whole estate, and must be co-extensive with the disposition made by the will; for if it is but of a part, it affects the will no farther than that part goes: if it is of a particular interest only, it will not operate as a revocation of the rest; and it has been determined, upon this ground, that a lease made of lands, already devised by will, only operates as a partial revocation, or a revocation *pro tanto*, of such will. Of Partial Revocations.

101. A person devised his lands to his eldest son, and afterwards made a lease of them, for thirty years, to his second son, to begin after his death. It was resolved, that this lease only operated as a partial revocation of the will, *quoad* the lease; for both might well stand together. But if the lease had been made to the devisee; then it would have been a revocation; because the estates would have been inconsistent with one another. Hodgkinson v. Whood, Cro. Car. 23. 1 Vern. 97. Coke v. Bullock, Cro. Ja. 49. Parker v. Lamb, 3 Bro. Parl. Ca. 12.

102. Although a mortgage in fee, made after the publication of a will, is a revocation of such will at Hall v. Dunch, 1 Vern. 329.

3 Atk. 805. 2 P. Wms. 334.

law; yet, in equity, it is only a revocation *pro tanto*, and the equity of redemption shall go to the devisee.

Harkness v. Bayley, Prec. in Cha. 514.

103. But if lands are devised to a person in fee, and the testator afterwards mortgages them to the devisee, it is a revocation *in toto*, being inconsistent with the devise.

Vernon v. Jones, Prec. in Cha. 32. Ogle v. Cook, 2 Bro. R. 592.

104. A conveyance in fee to trustees, for raising money to pay debts, being made for a particular purpose, will only operate as a revocation *pro tanto* of a prior devise, so far as relates to the payment of the debts, and no farther.

7 Bro. Parl. Ca. 517.

105. It is observable, that in the above cases, the whole fee simple being limited to the use of the mortgagee or trustee, the grantor parted with his whole estate at law, without taking back any legal estate or use to himself; and therefore, at law, nothing remained upon which the will could operate, or which could descend to the heir. In these cases, therefore, nothing being left to descend at law, the question has been, to whom the equitable interest should belong; and the courts of equity have held these cases to be exceptions from the general rule of law, which they ordinarily follow, on these grounds, as

3 Atk. 805.

stated by Lord Hardwicke, namely, that although the conveyance is of the fee simple of the land, yet in the consideration of a court of equity, the interest conveyed is merely a personal interest, having no quality of a real estate; and that therefore the testator is to be deemed, in equity, to have created only a chattel interest, as if he had created a term for years, which would have been a revocation *pro tanto* only at

Temple v. Chandos, 3 Ves. 685.

law. All that remained to the grantor was a right of redemption, and that right of redemption did not pass by the conveyance.

106. But where a person, after having made his will, executed a conveyance in trust for payment of debts in a schedule, and instead of declaring the uses to himself in fee, after payment of the debts, he declared that the trustees should convey to such uses and purposes as he by deed or will should appoint; and for default of appointment, to himself in fee. This was held to be a revocation. Kenyon v. Sutton, 2 Ves. Jun. 600.

107. It was decreed by Sir W. Grant in a late case, that a devise was not revoked by a bankruptcy; because the bankrupt laws take the property out of the bankrupt only for the purpose of paying his creditors; and from the moment that the debts are paid, the assignees are mere trustees for the bankrupt, and can be called upon to convey to him. Charman v. Charman, 14 Ves. 580.

108. With respect to leasehold estates, it has been long settled, that a surrender of a lease for lives, and the taking a new lease, will operate as a revocation of a former devise; for the testator, by the surrender, divests himself of his whole estate in the old lease, and acquires a new estate by the renewal. Revocations of Leaseholds.

109. Sir H. Marwood being seised of an estate for three lives, held of the Archbishop of York, made his will, by which he devised this lease. He afterwards surrendered it and took a new lease. It was resolved that this surrender and renewal operated as a revocation of the devise of the lease; for by the surrender the testator had put all out of him, had divested himself of the whole interest; so that there being nothing left for the devise to work upon, the will must fall: and the new purchase being of a freehold descendible, could not pass by a will made before such purchase. Marwood v. Turner, 3 P. Wms. 163. 2 Atk. 597.

110. Where a person has an estate *pur auter vie*, at the time of making his will, and afterwards pur- Galton v. Hancock, 2 Atk. 430.

chases the inheritance; it is a revocation of any devise of the estate *pur auter vie*.

ante, c. 3. § 36.

111. Although a term for years, acquired after the making of a will, passes by it; yet if a testator bequeaths a term for years, of which he is then possessed, and afterwards surrenders it, and takes a new term; this will operate as a revocation, or ademption of the bequest; and the new term will be considered as part of the personal estate.

Abney v. Miller, 2 Atk. 593.

112. A person devised two college leases for years to his mother, upon certain trusts. The testator afterwards surrendered the two college leases, and accepted two new leases of the same premises; but the last was not sealed with the college seal till after the death of the testator.

Rudstone v. Anderson, 2 Ves. 418. Hone v. Medcraft, 1 Bro. Rep. 261.

Lord Hardwicke decreed that the bequest of the first lease was revoked; but that of the second lease was not.

113. If, however, the words of the will show the testator's intention to dispose of all terms for years, whereof he may die possessed, a renewed term will pass; for a term for years being only a chattel, there is no necessity for a possession at the time when a will of it is made, or of a continuance of such possession till the testator's death.

Carte v. Carte 3 Atk. 174.

Stirling v. Lydiard, 3 Atk. 199.

114. A person devised in the following words:—"As to all and singular my leasehold estate, goods, chattels, and personal estate whatsoever, I give the same to my daughter." The testator, after making his will, renewed a lease for years with the Dean and Chapter of Windsor. Lord Hardwicke said, that what the testator had done in this case was not a revocation. Suppose the testator had purchased a new lease, would not that have passed? why then should not a new term in a lease equally pass?

115. A person devised to S. S. her leasehold garden, &c. for the term of his life, and after his decease to his children. After the publication of the will, the testatrix surrendered the lease, and took a new one. The question was, whether the bequest was revoked. Slatter v. Noton, 16 Ves. 197.

Sir W. Grant, M. R. said the question was, whether a specific devise of a leasehold estate was affected by a renewal of the lease, subsequent to the will. The ground upon which in many cases it had been held that renewed leases did not pass to the specific devisee was, that the thing given no longer existed. But as a testator might undoubtedly dispose of the future, as well as his present interest in a chattel real, it was a question of intention, what the subject of disposition was; whether only the interest which he had at the time of executing the will, or all the interest, though subsequently acquired, which he might have at his death, in the leasehold premises. That intention was to be collected from the words used by the testator to express it; there were no words prospective or future to take in any interest which the testatrix might subsequently acquire in the leasehold; and therefore the renewal operated as a revocation of the bequest: and decreed accordingly. James v. Read, 11 Ves. 383.

116. In the case of Darley v. Langworthy, the testator devised a term for years, in trust that the same might go unto and be enjoyed by the owner and possessor of his freehold estate thereby devised. ante.

The Court of Chancery decreed, that the bequest of the leasehold was revoked by the revocation of the devise of the freehold. But this was reversed by the House of Lords. 3 Bro. Parl. Ca. 365.

TITLE XXXVIII.

DEVISE.

CHAP. VII.

Of the Republication of Devises.

1. *Nature and Effect of.*
2. *Re-execution is a Republication.*
3. *And also a Codicil.*
10. *Unless confined to Lands devised by the Will.*
13. *Cancelling a second Will republishes the first.*
15. *But a Will once cancelled must be re-executed.*
17. *A Surrender of a Copyhold is a Republication.*

Section 1.

Nature and Effect of.

AS a will of lands is ambulatory during the life of the testator, and may be revoked by him at any time before his death, so it may be republished: and a republication of a will has a twofold effect; first to give it all the effect of a will made at the time of its republication, and secondly to set up and re-establish a will that has been revoked.

Re-execution is a Republication.

Martin v. Savage, 1 Ves. 440.

2. The first mode of republishing a will is by a re-execution of it; and although it was held before the statute of frauds, that any words importing an intention to republish a will, amounted to a republication; yet it is now settled, that an express republication of a will must be attended with the same circumstances that are necessary to its first publication; for otherwise the statute of frauds would be evaded.

3. It was formerly held, that since the statute of frauds there could be no devise of lands by an implied republication, for the paper in which the devise was contained ought to be re-executed. But it was afterwards determined, that a codicil duly attested, and annexed to a will, or referring to a will, should operate as a republication of such will, so as to make it take effect from the execution of the codicil; by which means lands purchased after the execution of the will, and before the execution of the codicil, pass by the will.

And also a Codicil. Litton v. Falkland, 3 Rep. in Cha. 90. Lansdowne's case, 10 Mod. 96.

4. A person by a codicil executed according to the statute of frauds, reciting that he had made his will, added,—"I hereby ratify and confirm my said will, except in the alterations after mentioned." It was decreed, that the testator's signing and publishing this codicil, in the presence of three witnesses, was a republication of his will, and both together made but one will; and therefore that lands purchased after the execution of the will, and before that of the codicil, passed by the will. And upon an appeal to the House of Lords, the decree was affirmed.

Acherley v. Vernon, Com. R. 381. 3 Bro. Parl. Ca. 85.

5. A testator by a codicil, written on the back of his will, gave additional legacies and annuities, ratifying and confirming his will; this was attested by three witnesses in these words:—"This will, with the several additions and alterations above, was signed, sealed, and republished by the testator, as his last will and testament, in the presence of us the subscribing witnesses." He afterwards made another codicil, which, though not dated, was agreed to have been made about four or five days before his death, in the presence of three witnesses, reciting that having in his will appointed several limitations and

Potter v. Potter, 1 Ves. 437.

remainders of his estate, some of which were not agreeable to his present intent; he revoked so much as should be found inconsistent with that codicil, ratifying and confirming the other parts which should not interfere therewith. The attestation of which paper was, "signed, sealed, published and declared by the testator as a codicil to the last will and testament."

Sir J. Strange, M. R. was of opinion that the first codicil amounted to a republication; it answered the idea of a republication, being indorsed on the will, and attested as the statute required; the word republished was used, which put it out of doubt: but if not, it would have amounted to a republication, as operating by additional charge on the real estate, and then concluding by ratifying and confirming the will. That in all cases of republication, no precise form of words was necessary; but any denoting the continuance of the testator's mind, so far as he made no alteration, would do. 1 Roll. Ab. 617. (Z. 1.) He was also of opinion that the second codicil amounted to a republication. It was an express declaration that the rest of his intent, not inconsistent therewith, should continue and be confirmed. It might be mischievous to construe that no republication could be, but by the testator's taking the will in his hands, and republishing it by indorsement on it; or annexing the codicil to the will itself. The law in favour of the power of devising, had dispensed with many forms of expression which would be absolutely necessary in other instruments; and inferred republication from an act done, as in 1 Roll's Ab. 617. The person intending to republish might be at a distance from the will itself; or might not have it in

his power, by its being in another's custody: and might know the substance, though he could not repeat the particulars.

6. The preceding cases appear to establish the proposition, that where a codicil ratifies and confirms a will, it operates as a republication of it; and Lord Hardwicke seems to have been of this opinion. But in some subsequent cases it was held, that a codicil which was not annexed to or incorporated in the will, would not operate as a republication of it, unless an intention to republish plainly appeared.

Gibson v. Rogers, Amb. 93. 1 Ves. 492.

7. Thus it was laid down by Lord Camden, that a codicil only operated as a republication of a will in two cases: 1st. By being annexed to it; and 2ndly, By the contents shewing the intention. And in the case cited in the margin he decreed, that the will was not republished by a codicil, because the codicil was not annexed to the will; and there was nothing in the codicil which showed any intent in the testator to republish the will. This doctrine has not, however, been assented to; but that established in Acherley v. Vernon was held in the following case to be the better one.

Attorney General v. Downing, Amb. 571.

8. A testator, by a will duly executed, devised all his estates in the county of Kent, that he might die seised or possessed of, to trustees, upon trust to sell them to pay his debts, and then to apply the remaining produce to various purposes. Afterwards he purchased other lands in Kent, subject to a mortgage, and covenanted in the purchase deed to pay the mortgage money; and gave a bond to indemnify the vendor. By a codicil, he made some slight alterations in his will, and declared that he ratified and confirmed it. The codicil was begun upon the last sheet of the will, and finished upon another sheet,

Barnes v. Crowe, 1 Ves. Jun. 486. 4 Bro. R. 2.

and was executed in the presence of two witnesses. He afterwards made another codicil, which he began upon the last sheet of the first codicil, and finished upon another sheet; and which was executed in the presence of three witnesses. By the second codicil he revoked a bequest of five shillings a week given by the will to his father, and another legacy; and instead of the latter, gave the legatee one moiety of two leasehold houses; and concluded thus:—"In witness whereof, I the said testator have to this my writing, contained in this and part of the said sheet of paper, which I declare to be a farther codicil to my said last will and testament, and which is to be accepted and taken as part thereof, set my hand and seal; that is to say, my hand at the bottom of the said preceding sheet, and my hand and seal to this last sheet thereof, this 28th October 1786, in the presence of three witnesses."

The question was, whether the second codicil was a republication of the will, so as to pass to the trustees lands purchased after the date of the will.

Lord Commissioner Eyre delivered the opinion of the Court, and said, that upon looking into the cases of Acherley v. Vernon, and the Attorney General v. Downing, the question, if it was not to be considered as determined, and so determined as that the Court could hardly consider itself at liberty to review it, would be a question of great difficulty; for it seemed to him that those two cases were in direct opposition to each other. The latter was determined by a very able Judge, and having the former before him, which increased the difficulty. But it seemed to him, upon the best consideration, that the former case was so determined, and was of such authority, that every thing must yield to it. The principle that a codicil

attested by three witnesses shall be a republication, seemed intelligible and clear. The testator's acknowledgement of his former will, considered as his last will, at the execution of the codicil, if not directly expressed in that instrument, must be implied from the nature of the instrument itself; because, by the nature of it, it supposes a former will, refers to it, and becomes part of it; and being attested by three witnesses, his implied declaration and acknowledgement seems also to be attested by three witnesses. Before the statute it was no part of the essence of the obligation, that the will should be re-executed; any thing that expressed the testator's intention, that the will should be considered as of a subsequent date, was sufficient. Since the statute, re-execution of the will was not necessary; nothing more was required than a writing according to the provisions of the statute, expressing that intent. Therefore Lord Hardwicke might well say, he saw no great difference between the words,— "I desire this codicil may be a part of my will;" and the words,—"I republish it," which it was there admitted would have done. In the Attorney General v. Downing, Lord Camden supposes a particular intent to republish ought to appear; and that annexation, or particular expressions in the codicil, would demonstrate that intention. If that was necessary, not only Lord Hardwicke's opinion could not stand, but neither could Acherley v. Vernon, for there was no particular intent to republish; but the testator referred to his will, made alterations, and gave sufficient demonstration, that when making and executing the codicil, he considered the will as his will, and from that a republication was implied; but it was not particularly in his thoughts, to do any formal act of republication. Amb. 97.

Upon considering these cases, he confessed he inclined to stand upon the general proposition stated by Lord Hardwicke, to show that the will, in the case before them, was republished. This case had auxiliary circumstances which might seem to bring it within the Attorney General v. Downing; for the testator expressly declared, by the original will, that he meant it to operate upon all the lands whereof he should die seised or possessed. If he had not actually incorporated them together, he had inseparably annexed the codicil to the will, not by a wafer or wrapper, or any thing *dehors* the instrument, but by what he called internal annexation; and that of such a kind, that all the papers taken together might be considered as published, when the codicil was executed. But he was afraid to rely upon these circumstances, for fear of intrenching upon the statute, by raising evidence out of circumstances in their nature parol; the general ground was safer and better.

It was decreed that the codicil operated as a republication of the will.

9. The doctrine laid down by Lord Commissioner Eyre in the above case, is confirmed in the following one.

Piggott v. Waller, 7 Ves. 98.

Mr. Piggott made his will, duly attested, by which he devised all his real estates to trustees, upon several trusts. The testator made two codicils to his will, which only related to personal estate, but were duly attested; the second of which contained these words, —"To be annexed to my last will and testament, and made part thereof, to all intents and purposes." The testator had purchased a real estate prior to the making of the second codicil; and the question was, whether that codicil operated as a republication of the will, so as to pass that estate.

Sir W. Grant, M. R., after stating the preceding cases, said, the Lords Commissioners in Barnes v. Crowe appeared to have held, that in Acherley v. Vernon it was established, that every codicil duly attested ought to be held a republication, and to have adopted and acted upon that rule in that case; their opinion seemed to be, that the codicil was incorporated in the will. The general proposition referred to by Lord Commissioner Eyre was, that the execution of a codicil should in all cases be an implied republication. Lord Commissioner Eyre stated the particular circumstances in that case, amounting to what he called internal evidence of annexation; the first codicil, which was not duly executed, was begun upon the last sheet of the will, and the codicil duly attested was begun upon the last sheet of that codicil. But Lord Commissioner Eyre inclined to think annexation could have no effect, and abandoned that ground, for fear of intrenching upon the statute, by raising evidence out of circumstances in their nature parol; and took the general ground, as safer and better. Undoubtedly, therefore, that case was determined upon that general ground. It would be impossible without contradicting that case, which, as it laid down a general rule, he had no disposition to do, to determine in this case against the republication: except the single circumstance of annexation, which Lord Commissioner Eyre laid out of the question, there was no substantial difference between that case and this. That afforded a certain rule; and if he departed from that, it would only be to set every thing loose again, and not to get back to what he thought the better, the old rules, for then Acherley v. Vernon would be in the way. He was therefore disposed, from the convenience of adhering to settled rules,

Walpole v. Cholmondeley, 7 Term R. 138. 3 Ves. 402.

and deference to former decisions, to hold the codicil a republication. And decreed accordingly.

Holmes v. Coghill, 7 Ves. 499.

In a subsequent case, Sir W. Grant said, that though a codicil had the effect of republishing the will, and making it speak as at the time of the republication; yet that where a power was executed by a will, but afterwards discharged, and a new power created, a subsequent codicil would not, by the mere effect of republishing the will, be an execution of the power.

Unless confined to Lands devised by the Will.

10. But where the effect of a codicil is expressly confined to the lands devised by the will, to which it is annexed; it does not operate as a republication of such will, so as to make it pass after-purchased lands.

Strathmore v. Bowes, 7 Term R. 482.

11. G. Bowes devised all his freehold and copyhold lands to trustees, upon certain trusts: he afterwards purchased other lands, and then made a codicil, whereby, after reciting that he had devised all his freehold and copyhold lands to trustees, he revoked the same, so far as related to two of the trustees named in his will, and devised his *said* lands, &c. to the other trustees upon the same trusts; and concluded by declaring the codicil to be part of his will.

Upon a case sent out of Chancery for the opinion of the Court of King's Bench, Lord Kenyon said, it was clear that a codicil, confirming a will of lands in general words, would pass lands purchased between the making of the will and the codicil. But here the question was, whether it was the intention of the devisor to pass by the codicil any thing more than would have passed by the will itself. Now what was this case? The testator gave all his real and copyhold estates to several trustees by his will, in words sufficiently comprehensive to carry all the estates of

which he was then seised; then he made a codicil, not to extend his will, but only to revoke so much of it as vested the estates in some of the trustees, whom he had named in his will; and then he gave *his said lands, &c.* that is, those lands which he had before given by his will, to the rest of the trustees.

The Court certified, that the codicil was not a republication of the will, so as to extend the operation of the will to the real estates purchased after the will was executed; it extended to the estates devised by the will, and no farther.

The Court of Chancery decreed accordingly. And on an appeal to the House of Lords, the decree was affirmed, with the concurrence of the Judges; Lord Thurlow dissenting, and holding the codicil to be a republication. 2 Bos. & Pull. 500.

12. In the case of Piggott v. Waller, Sir William Grant said, he did not conceive the decision in Strathmore v. Bowes to be inconsistent with that of Barnes v. Crowe. It did not follow from the doctrine in the latter case, that if it distinctly appeared upon the face of the codicil that it was not the intention to republish the will, the codicil should be held a republication. In Strathmore v. Bowes, the Court held, that it appeared upon the face of the codicil that it was not the intention to pass any other lands than those which were devised by the will; it would have been a contradiction, therefore, to make it pass after-purchased lands. 7 Ves. 124.

13. Where a person makes a will, and afterwards revokes it by making another will, but does not actually cancel the first will; the cancelling of the second will is a republication of the first. Cancelling a second Will republishes the first.

14. A person made a will in 1757, and another in 1768. The former was never cancelled; the latter Goodright v. Glazier, 4 Burr. 2512.

was cancelled by the testator himself. Both were in the testator's custody at the time of his death; the second cancelled, the first uncancelled. The counsel for the heir at law contended that the second will revoked the first, and being afterwards cancelled, the testator had died intestate; and cited the case *ex parte* Hillier, 3 Atk. 798; where Sir George Lee determined that the execution of a second will was a revocation of a first, though the second was afterwards cancelled; and that the cancelling the second did not set up the first; which was the same point, only that it was personal property.

Lord Mansfield said, that with regard to the case *ex parte* Hillier, Mr. Atkyns only reported what passed in Chancery: there might be other circumstances appearing to the ecclesiastical court, which might amount to a revocation of a will of personal estate. Here the intention of the testator was plain and clear. A will was ambulatory till the death of the testator. If the testator let it stand till he died, it was his will; if he did not suffer it to do so, it was not his will. Here he had two; he had cancelled the second; it had no effect, no operation; it was as no will at all, being cancelled before his death; but the former, which was never cancelled, stood as his will.

Mr. Justice Yates said a will had no operation till the death of the testator; the second will never operated, it was only intentional; the testator changed his intention, and cancelled it. If by making the second, the testator intended to revoke the former, yet that revocation was itself revocable, and he had revoked it.

But a Will once cancelled must be re-executed.

15. But where a person, having made a new will, cancelled the former one, and afterwards cancelled

the latter will; it was held that this did not amount to a republication of the former will: because, where a will is once cancelled, nothing but a re-execution of it will amount to a republication.

16. N. Newenden made a will in 1759, of which he executed a duplicate, and gave it to another person: he made a second will in 1761, at which time he cancelled one of the copies of his first will, by tearing off the seal. After the testator's death, both the first and second wills were found together in a paper cancelled; and the duplicate of the first will was found uncancelled, in the testator's room, among other papers. It was determined that the testator had died intestate; for the cancelling the copy which the testator had in his possession, of the first will, was a cancelling of the duplicate: and therefore, at the time of making the second will, the first was, upon every principle of law, most clearly revoked, and could never be set up again, but by a re-execution.

Burtenshaw v. Gilbert, Cowp. 49.

Pemberton v. Pemberton, 13 Ves. 290.

17. A surrender of a copyhold to the use of a person's will may be worded in such a manner as to operate as a republication of a former will, so as to make the copyhold estate pass by such will.

A Surrender of a Copyhold is a Republication.

18. A person having made his will, and devised all his freehold and copyhold estates to several uses, afterwards purchased other copyhold lands, which he surrendered thus: "To the uses declared or to be declared in and by his last will and testament."

Heylin v. Heylin, Cowp. 130.

The Court of Chancery directed a case to be sent to the Court of King's Bench, whether the after-purchased copyholds passed by the will.

Lord Mansfield said, when a man republishes his will, the effect is, that the terms and words of the will should be construed to speak with regard to the property he is seised of at the time of the date of the republication; just the same as if he had such additional property at the time of making his will. Therefore, if one devises lands by the name of B. C. and D. and purchases new lands, and republishes his will, the republication does not concern such new lands, because the will speaks only of the particular lands, B. C. and D. But if the testator in his will says, "I give *all* my real estate;" a republication will affect such newly-purchased lands, because it is then the same as if the testator had made a new will. Apply this rule to the case of a surrender, and I am of opinion that the surrenderor may express himself, so as to make it relate to a will actually made; and that the copyhold lands so surrendered will pass by it. Suppose a testator, seised of copyhold lands, makes his will without a surrender; if he afterwards surrender them to the use of his will, such surrender will clearly make his will good, and is effectual to pass them; because it only obviates the mode and form of conveyance. What has the testator done here? Having made his will, and declared his lands to uses, he surrenders his newly-purchased copyholds to the uses, intents, and purposes declared, or to be declared, in his will. It is precisely the same thing as if he had said, "And whereas I have made a will so and so, and devised all my lands to I. S. to such and such uses; I mean these newly-purchased lands should pass to the same uses."

The Court certified that the surrender did, by express reference to the uses declared by the will,

adopt and apply the words of the will to the copyhold lands, as if the testator had been seised thereof at the time of making the said will; and therefore they were subject to the same uses, to which all the testator's copyhold lands were devised. Att. Gen. v. Vigor, 8 Ves. 256.

TITLE XXXVIII.

DEVISE.

CHAP. VIII.

Of void Devises.

2. *Devise to the Heir at Law.*
6. *Though charged with Debts.*
10. *The Devisee must be Sole Heir.*
12. *A Difference in the Estate renders the Devise good.*
17. *Devises to Charitable Uses.*
18. *Where there has been Fraud.*
20. *Where the Devisee dies before the Devisor.*
32. *The Estate descends to the Heir.*
35. *Where the Devise is uncertain.*

SECTION 1.

DEVISES are in some cases void *ab initio*; as where the testator devises what the law already gives, or in mortmain; or where any fraud has been practised on the testator. Devises may also become void by an event subsequent to the will; as where the devisee dies in the lifetime of the testator: and devises are void where they are totally uncertain.

Devise to the Heir at Law.

2. With respect to the first sort of devises that are void *ab initio*, it is a rule of law, that where a testator makes the same disposition of his estate as the law would have done if he had been silent, the will being unnecessary, is void. Therefore if a person devises his lands to his heir at law in fee, it is a nullity, and the heir will take by descent, as his better title; for the descent strengthens the title,

by taking away the entry of such as may possibly have a right to the lands; whereas if the heir takes by the devise, he is then only in by purchase. Plowd. 545. 1 Inst. 12 *b.* 2 Saund. 7. *n.*

3. This rule applies to wills made in pursuance of powers, as well as to devises deriving their effect from the statute of wills. Tit. 32. c. 16. § 23.

4. If a person devises lands to his wife for life, remainder in fee to I. S. who is his heir at law, it is a void devise as to the remainder; because the reversion would have descended to I. S. after the determination of the particular estate. Baspool's case, 2 Leon. 101. Hurst v. Winchelsea, 1 Black. R. 187.

5. The same rule is applied to copyholds; and therefore a surrender of a copyhold to the use of a will, and a devise thereof to the heir at law, will not give the devisee an estate by purchase. Smith v. Trigg, 1 Stra. 487.

6. Although the devisor charges the estate with the payment of debts, or with portions to his younger children, yet if he afterwards devises the estate to his heir at law in fee, it will be void; and the heir will take by descent. Though charged with Debts. Fearne's Opin. 229.

7. A person devised to each of his younger children 20 *l.* when they attained the age of 21 years, and devised all his estates to his eldest son, to hold to him and his heirs, upon condition that he should pay to his other children the said sums appointed to them; and if he did not pay the same, then the lands to go to the younger children and their heirs. Adjudged that the eldest son took by descent. Haynworth v. Pretty, Cro. Eliz. 833. 919. Emerson v. Inchbird, 1 Ld. Raym. 728.

8. A person seised in fee, devised lands to his wife for life, and after her decease, to his next heir at law, and to his or her heirs; provided such heir should pay 1000 *l.* to such person or persons as his wife should appoint. It was resolved that the heir took by descent, and not by the will. And it would be mischievous if every little legacy should alter the course Clarke v. Smith, Com. R. 72.

of descent, upon which the heir might plead to the obligation of the ancestor, *riens per descent.*

Allen v. Heber, 1 Black. R. 22.

9. In an action of debt on the bond of the father, to whom the defendant was heir, the plea was *riens per descent*; the fact was, that the father had devised his lands to the defendant, charged with debts; and the question was, whether this made him a purchaser. The Court said, that a charge on the estate did not alter the manner of the heir's taking the land. A devise was void where it gave the same estate as would be taken by descent. Judgment for the plaintiff.

The Devisee must be sole Heir.

10. The devisee must be sole heir to the lands devised; for if he is only one of the heirs, he will take under the devise.

Reading v. Royston, 1 Salk. 242. 2 Ld. Raym. 829. Com. R. 123.

11. A. B. having two daughters, one of them had issue a son, and died. A. B. devised all his estate to this son of his daughter in fee; and the question was, whether the son should take all by this devise, or one moiety by descent, and the other by devise; for there could not be a descent of a moiety to one coparcener as heir: one could not plead a descent *uni filiæ et cohæredi*; but it was a descent to all. It was resolved that the grandson took by devise.

A Difference in the Estate renders the Devise good.

12. Where an estate is devised to an heir at law, different in point of quantity from that which he would take by descent, the devise shall prevail, and the devisee take under it as a purchaser. And therefore it is laid down in Plowden, that if a man devises his land to his son and heir, to have to him and the heirs of his body, this is a good devise; because it is another estate than he would have had by descent.

p. 545.

Scott v. Scott, Amb. 383.

13. A person devised to his eldest son, and to his heirs and assigns, all other his real estate not before devised; nevertheless, in case he should die without issue, not having attained twenty-one, then from

and immediately after his death under age, and without issue, unto the testator's son William.

Lord Keeper Henley was of opinion that the eldest son took by devise, as having under the will a different estate than would have descended to him; the one being pure and absolute, the other not.

14. A difference in the quality of the estate will also have the same effect. Thus in Mich. 37-38 Eliz. Lord Coke, who was then Attorney General, demanded of the Court of King's Bench their opinion on this case. A man having two daughters, being his heirs, devised his lands to them and their heirs, and died. Whether they should take as joint tenants by the devise, or as coparceners by descent? And all the Justices held clearly that they should have it as joint tenants; for the devise gave it to them in another degree than the common law would have given it. Cro. Eliz. 431.

15. In a formedon in the descender, brought by A. B. & C. of lands in gavelkind, the warranty of the ancestor was pleaded in bar against them, upon which they were at issue, if assets by descent. It was found by verdict that the father of the demandant was seised in fee of the lands, being of the nature of gavelkind, and devised the same to the demandants, being his heirs by the custom, and to their heirs equally to be divided amongst them. And if the demandants should be accounted to be in of the lands by descent, or devise, was the question; for if by devise, then they should not be assets. The court was of opinion that they were in by the devise; because they took as tenants in common. Beare's Case, 1 Leon. 112.

16. In an opinion of Mr. Fearne's which has been published, he says, that a devise to the heir and another, as tenants in common, will not prevent the heir's taking his moiety by descent. For suppose a Fearne's Opin. 128.

testator devises a moiety, or any other undivided share of his real estate, to a stranger, making no disposition of all the remaining undivided share, such remaining share would of course descend to his heir at law, and he must hold it in common with the devisee of the undivided share devised. It was clear, therefore, that an heir might take by descent, as tenant in common with a devisee, an undivided part of the estate of which his ancestor was solely seised: and it appeared to be immaterial whether the share he so takes is expressly devised to him, or left unnoticed by the will: for if expressly devised, he takes it in common; and if not noticed, he takes it in the same manner: and a devise to two or more as tenants in common is in effect a devise of one undivided part to one, and of another undivided part to the other. So that under such a devise to an heir and a stranger, as tenants in common, the heir takes as if one undivided moiety were devised to the stranger, and the residue to himself; that is, in the same manner as if no disposition at all of such residue had been expressed in the will, in which case he would have taken by descent; and therefore the same estate being devised to him in such residue, as he would have taken by descent, the general rule respecting devises to an heir extends to it.

infra, c. 15.

Devises to Charitable Uses. Tit. 32. c. 2. § 44.

17. In consequence of the statute 9 Geo. II. c. 36, which has been already stated, all devises and bequests of lands and tenements, or of any sums of money to be laid out in the purchase of lands and tenements, for any charitable uses whatsoever, are declared void.

Where there has been Fraud.

18. Where any fraud or circumvention has been practised on a testator, or where he was incapable of disposing of his lands from any weakness of mind,

his will is void. But where the validity of a will of lands is impeached on these grounds, a court of equity will not set it aside, but will direct a trial at law on the issue of *devisavit vel non*; for if the will be obtained by fraud, or be made by a person incapable of devising, it is not in point of law the testator's will; and therefore these points are proper to be tried before a jury. Kerrick v. Bransby, 7 Bro. Parl. Ca. 437. Webb v. Claverdon, 2 Atk. 424.

19. It was held in a modern case, that in order to set aside a will for fraud, parol evidence might be given of questions asked by the testator, at the time of executing his will, whether the contents were the same as those of a former will. Doe v. Allen, 8 Term R. 147.

20. A devise may become void by an event subsequent to the making of a will. Thus it is a rule that if the devisee dies before the devisor, the devise becomes void. This doctrine was probably adopted from the rule of the civil law—*Pro non scriptis sunt iis relictâ, qui vivo testatore decedunt.* Where the Devisee dies before the Devisor. Domat. vol. 2, 98.

21. A. devised lands to B. and his heirs. B. died in the lifetime of the testator. The question was, whether the heir of B. should take any thing by this devise. It was determined that he should not; for it was a principle of law, that in all gifts, whether by devise or otherwise, there ought to be a person in *esse* capable of taking at the time the gift vests; and as the thing devised cannot vest till the death of the devisor, at which time the devisee was dead, it followed that he could take nothing by the devise. As to the word heirs being inserted in the devise, it was only used as a word of limitation, to denote the quantity of estate which the devisor meant to give, and not with an intention to describe the heirs of B., or to give them any thing. Brett v. Rigden, Plowd, 341.

22. Henry Fuller, having issue four sons, John, Richard, Edward, and Henry, devised lands to his Fuller v. Fuller, Cro. Eliz. 422.

second son, and the heirs of his body, and after his death without issue, then to his third son. The second son died in the lifetime of his father, leaving issue. It was adjudged that the issue of the second son took nothing by the devise, it being lapsed; but that the third son might enter.

Hutton v. Simpson, 2 Vern. 722.

23. T. Addison having two daughters, devised all his estates to his second daughter, and the heirs of her body begotten, and for want of such issue, to his eldest daughter. The second daughter died in the lifetime of the testator, leaving a son. Adjudged that the devise to the second daughter became void, by her dying in the lifetime of the testator; and that her son could not take as heir of her body. It was also resolved that the eldest daughter should take immediately, by virtue of the devise, for when the first devise is void, the remainder shall take place as if no such devise had been made.

Wynn v. Wynn, 3 Bro. Par. Ca. 95

24. R. Wynn devised his estate to his brother M. Wynn, and the heirs male of his body, remainder to O. Wynn and the heirs male of his body. M. & O. Wynn died in the lifetime of the testator; but O. Wynn left an only son, who claimed under the devise. It was resolved that he took nothing.

Goodright v. Wright, 1 P. Wms. 397. 1 Stra. 25. 10 Mod. 370.

25. One seised in fee devised lands to A. and his issue, remainder to B. and his issue, remainder to the heirs of A. A. died without issue in the lifetime of the testator; and B. died in the lifetime of the testator, leaving issue the defendant, who was also the heir of A.; and the plaintiff was the heir of the testator. The question was, whether as the devisees A. and B. both died in the lifetime of the testator, the issue of B., who was born after the will was made, and so could not take jointly with the devisees, could take either as heir of the body of B. or as right heir of A.

Lord Ch. J. Parker delivered the unanimous opinion of the court, that this case was exactly within the reason of the case of Brett v. Rigden. First, because as well in this case the word *issue*, as in that the word *heirs*, was clearly used as a word of limitation, viz. to measure out the quantity of estate that the devisee was to take; and not as a word of purchase; the devisee only being in the view and consideration of the testator, and the words heir or issue mentioned for nothing else but to limit what estate the devisee should take.

ante, § 21.

Busby v. Greenslate, infra, c. 14.

26. Susan Jolland devised certain lands to the use and behoof of her sister Elizabeth, the wife of John Belchier, and her assigns, for and during the term of her natural life; and after the determination of that estate, to the use of W. A. & J. P. and their heirs, during the life of the said Elizabeth, upon trust to preserve the contingent uses and estates therein-after limited from being defeated or destroyed; and from and after her decease, then to the use of the heirs of the body of the said Elizabeth, lawfully issuing; and for want of such issue, to the use and behoof of her sister Catherine Jolland, in the same words as are used in the devise to Elizabeth.

Hodgson v. Ambrose, Doug. 337.

Elizabeth Belchier died in the lifetime of the testatrix, leaving issue one daughter, Catherine. Upon the death of the testatrix, Catherine Jolland, who married one Hodgson, suffered a recovery of the premises. A question having arisen in the Court of Chancery respecting the construction of this will, a case was made for the opinion of the Judges of the Court of King's Bench, upon the following question: "Whether Catherine Belchier, the daughter of Elizabeth Belchier, took any and what estate under the will of Susan Jolland." To which the Judges of the

Vide infra, c. 14.

Court of King's Bench answered—"If Elizabeth Belchier would have taken an estate tail in case she had survived the testatrix, we think, by her dying before the testatrix, it is a lapsed devise, and Catherine the daughter of Elizabeth can take nothing."

The Court of Chancery having decreed in conformity to this certificate, an appeal was brought in the House of Lords, and the following question was put to the Judges: "Whether Catherine Belchier, the daughter of Elizabeth Belchier, took any and what estate under the will of Susan Jolland."

The Lord Ch. B. delivered the unanimous opinion of the Judges present, that Catherine Belchier took no estate under the will of Susan Jolland *. The decree was affirmed.

Warner v. White, 3 Bro. Parl. Ca. 435.

27. Rich. White having issue Simon his eldest son, and Hamilton his second son, devised all his lands in B. to his eldest son Simon, and the heirs of his body; and for default of issue of his said son Simon, then he devised his said estate to his son Hamilton, and the heirs of his body. Simon died in the lifetime of his father, leaving issue four sons and four daughters. The question was, whether the eldest son of Simon took any thing by this devise, or whether it lapsed to Hamilton, the person next in remainder.

The Court of King's Bench in Ireland determined that the eldest son of Simon took under this devise. This judgment was reversed by the Court of King's Bench in England. A writ of error was then brought in the House of Lords; and it was contended on behalf of the eldest son of Simon, that he ought to

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* It was also held that Catherine Jolland took an estate tail, infra, c. 14.

take under this devise. 1°. Because it was plain the testator did not mean to exclude the issue of his eldest son from the inheritance, the children of Simon being alive, and known to the testator, at the time he made the devise to Simon and the heirs of his body. 2°. Because the remainder to Hamilton was expressly limited to take effect only in default of issue of the testator's son Simon; and no devise was made of the estate until such default should happen; and it was a principle in law, that the heir should take every thing which was not devised from him. 3°. Because courts of justice have been always anxious to effectuate the intentions of testators, where they are not contrary to the rules of law, or settled authorities; and there was no case to be found in which it had been adjudged that a devise to a man and the heirs of his body lapsed for the benefit of a person in remainder, from the circumstance of the first devisee dying in the testator's lifetime; where it appeared that the heir of the body of the first devisee was likewise heir at law of the testator.

On the other side it was contended, that by the established rules of law, the devise to Simon became void, by his death in the lifetime of the testator; and the remainder to Hamilton the second son, took effect immediately on his father's death. That this doctrine had been adopted in early times, and had continued down to the present. It was established in the early part of the reign of Queen Elizabeth, and was recognised in a variety of cases down to the year 1780, nor was it ever judicially contradicted or impeached. But there appeared at the end of the report of Fuller v. Fuller, Cro. Eliz. 422, a *dictum* of Lord Ch. J. Popham, that where a devise was to a son in tail, his issue, in case of his death in the life-

ante, § 22.

time of his father, should take before the remainder-man. But this at most was an extrajudicial opinion; and was not admitted in the case of Hodgson v. Ambrose.

ante, § 26.

The following question was put to the Judges: "Whether, in the event that had happened, the defendant Hamilton White took any and what estate in the lands of B. under the devise to him, for default of issue of Simon White."

The Lord Ch. B. delivered the unanimous opinion of the Judges present, that Hamilton White took an estate tail; and the judgment of the Court of King's Bench in England was affirmed.

28. A republication of a will after the death of a devisee in tail, will not give any estate to the issue of the devisee.

Doe v. Kett, 4 Term R. 601.

29. N. G. devised lands to her god-daughter and the heirs of her body, who died in the lifetime of the testatrix, leaving a son. The devisor knew of the death of the devisee, and of the birth of her son; after which she made a codicil that operated as a republication of her will. It was determined that the devise having become void by the death of the devisee, did not operate by its republication, so as to give any estate to the son of the devisee.

Tit. 12. c. 1. § 91.

30. It has been stated, that where a trust is sufficiently created, it will fasten itself on the land, and will not become void by the incapacity or death of the trustee.

Att. Gen. v. Downing, Amb. 571.

In consequence of this principle it has been determined, that where an estate was devised upon trust for a charity, the death of the devisee in the lifetime of the testator did not make the devise void.

2 Ves. 77.

31. Lord Hardwicke has observed, that in the case of copyholds, though the land passes by the

surrender, and the will is only directory of the uses, yet if the devisee dies in the lifetime of the devisor, the devise is void.

32. In the case of a lapsed devise in fee, the estate will not go to the residuary devisee of the real estate, but will descend to the heir at law of the testator. The Estate descends to the Heir.

33. A person devised his messuage in E. to F. C. and his heirs, and all the rest and residue of his messuages, lands, and hereditaments to I. L. his heirs and assigns for ever. F. C. died in the lifetime of the testator, by which the devise to him lapsed. And the question was, whether the latter clause in the will would carry over the lapsed devise to the residuary devisee, or it should descend to the heir at law of the testator. Wright v. Hall, Fortesc. 182. Roe v. Fludd, Id. 184. S. P.

The Court held that the devise of all the rest and residue did not convey what was devised before; for wills must be construed from the intent of the testator at the time of making them, which appeared to be to give his whole estate to F. C. and his heirs in the messuage of E.; and at the time when the will was made he had no residue left in that messuage; and the devise to F. C. being void, the messuage would descend to the heir.

34. In a subsequent case of the same kind, reported by Lord Ch. J. Willes, the following propositions were laid down. 1°. That the intent of the testator ought always to take place, when it is not contrary to the rules of law. 2°. That the intent of the testator ought always to be taken as things stood at the time of making his will; and was not to be collected from subsequent accidents, which the testator could not then foresee. 3°. That when a testator in his will had given away all his estate and interest in certain lands, so that if he were to die immediately Doe v. Underdown. Willes Rep. 293.

nothing remained undisposed of, he could not intend to give any thing in those lands to his residuary devisee. And judgment was given accordingly.

Where the Devise is uncertain.

35. Where it is impossible to discover, from the words of a will, what was meant to be given, or to whom; the will is void for uncertainty.

5 Rep. 68 *b.* Doe v. Joinville, 3 East, 172.

36. Thus it is laid down in 33 & 34 Eliz., by Wray and Anderson, Ch. Justices, that if a man has two sons of the name of John, and devises his lands to his son John, if no direct proof can be made of his intent, as to which of his sons he meant, the devise is void for the uncertainty.

TITLE XXXVIII.

DEVISE.

CHAP. IX.

Of the Construction of Devises—General Rules.

1. *The Intention will be effectuated.*
15. *Words rejected or supplied.*
18. *The word "or" construed "and."*
25. *Estates sometimes transposed.*
26. *Contradictory Devises.*
28. *A Perpetuity cannot be created by Will.*
34. *Construction* cy pres.
39. *No Averment allowed to explain Wills.*
43. *Unless there is a latent Ambiguity.*

SECTION 1.

A WILL being considered as an instrument made at a time when the testator cannot have the assistance of persons skilled in the law, or, as it is usually expressed, when he is *inops consilii;* the Judges have at all times held that it shall not be construed strictly like a deed, but that the intention of the testator, though not expressed in the proper legal and formal words, shall notwithstanding be carried into effect; it being a maxim of the English law—*Quod ultima voluntas testatoris perimplenda est, secundum veram intentionem.* The Intention will be effectuated.

2. It follows that no technical words are necessary to convey a testator's meaning; and whenever that is doubtful, it must be collected from the scope of the whole will, compared with its several parts: for courts 2 Burr. 770.

of justice cannot make a will for the party, nor interpret it by any arbitrary rule: but that mode of construction is to be preferred, which gives effect to every part of the will, so that each word may have its particular operation, and not be rejected, if any construction can possibly be put upon it.

2 P. Wms. 282.

3 Burr. 1541.

3. The intention of the testator must be collected from the whole will, *ex visceribus testamenti;* so as to leave the mind quite satisfied about what the testator meant. And as a will of lands must be in writing, such collection of the testator's intention must be derived from the will itself; for no averment or parol evidence can be admitted to explain any thing dubious on the face of a will; except in a few instances which will be mentioned hereafter.

4. General words in one part of a will may be restrained by subsequent words, and shall be construed so as not to defeat the intention of the testator, to be collected from any other part of the will; but where there is a manifest general intent, the construction should be such as to effectuate it, though by that construction some particular intent may be defeated.

1 Burr. 38. 4 Term R. 82. infra, c. 12. & 14.

2 Burr. 1108. Doug. 341.

5. The construction ought to be such, that the intent of the testator may be rendered consistent with the rules of law; for otherwise every man would make a new law to himself; the metes and bounds of property would be vague and indeterminate; which would end in its total insecurity.

2 P. Wms. 741. Doug. 341.

6. Technical words are presumed to be used in the sense which the law has appropriated to them; unless the contrary appears. But where the intention of the testator is plain, it will be allowed to control the legal operation of the words, however technical.

Cowp. 306. 637.

7. Introductory words often assist in showing the intention of a testator; and in such cases the courts

have laid hold of them, as they do of every other circumstance in a will, which may help to guide their judgment to the right and true construction of it.

8. The particular situation of a testator, the number of his children, the different kinds of property whereof he was possessed at the time of making his will, are circumstances from which arguments may be drawn respecting his intention; and it has been determined, that the same words may have a different construction, when applied to different kinds of property. 1 P. Wms. 286. 4Bro. R. 441. 2 Ves. 616. Doe v. Fyldes, Cowp. 833.

9. An heir at law shall not be disinherited by a will, unless there are express words, or a necessary implication, to that effect. For the title of the heir being founded on the laws of descent, which are certain, is therefore not to be defeated by an uncertain devise. Prec. in Cha. 473. Cowp. 99.

10. A dubious expression in a will may be explained by a codicil or schedule, annexed to such will. Hayes v. Foord, infra.

11. Declarations of trusts executed, contained in a will, are construed in the same manner as devises of legal estates; but where a conveyance or settlement is directed to be made, a court of equity will construe the will more liberally, in order to effectuate the intention of the testator. infra, c. 14.

12. In the construction of wills adjudged cases may be argued from, if they establish general rules of construction, to find out the intention of the testator. And where once a court of justice has determined the meaning of certain words, or forms of expression, the same effect will in all future cases be annexed to them; for the great object in questions of property is certainty. And Lord Mansfield has observed, that if an erroneous or hasty determination has got into practice; there is more benefit derived from adhering to it, than if it were to be overturned. 1 Burr. 233. Hodgson v. Ambrose, infra, c. 14.

Tracts, 295. Fearne Cont. Rem. 266.

13. Mr. Hargrave has justly observed, that if courts either of law or equity, in both of which the rules of interpretation must be the same, should indulge an unlimited latitude of forming conjectures upon wills, instead of attending to their grammatical or legal construction, the consequence must be endless litigation; every title to an estate, that depended on a will, must be brought into Westminster Hall: for if once we depart from the established rules of interpretation, without a moral certainty that the meaning of the testator requires it, no interpretation can be safe, till it has received the sanction of a court of justice: for how can a client, or a purchaser, be assured that the conjecture of the most able counsel, or the most experienced conveyancer, will be in all points the same as the conjectures of the Judges, or the Chancellor.

5 Term R. 561.

14. In a modern case Lord Kenyon said, "Had there not been such a current of authorities as we find in the books, since the passing of the statute of wills, on the construction of wills, to further, as it has been called, the intentions of devisors; perhaps it would have been better that the same strict words had been required in testamentary dispositions of land, as in those by deed; because then the language of passing estates would have been so familiar, that few questions would have arisen on wills. For it has been often observed, that few questions arise on the construction of deeds, when compared to those which daily arise on wills. But we are bound to consider the series of authorities on this subject as the law of the land; and it would be extremely dangerous now, to remove those land-marks of real property, on which mankind have acted for such a length of time."

Words rejected or supplied.

15. Where there are words in a will which have no meaning, or which are contrary to the general inten-

tion of the testator, they will be rejected; and, on the other hand, words omitted by mistake, and which are absolutely necessary to effectuate the general intention, will be supplied. Hawes v. Hawes, infra, c. 15.

16. Sir W. Coryton devised, for the preserving and continuing his real estate in his name and blood, all his lands to trustees and their heirs, until his son John should attain his age of twenty-seven, and no longer, in trust in the meantime out of the rents and profits for paying legacies, and to lay out the residue in the purchase of lands of inheritance, to be settled in the same manner as the rest of his estate; and from and after the determination of the estate limited to them as aforesaid, and the full accomplishment of his son's age of twenty-seven, that his said trustees and their heirs should stand and be seised of all the lands devised to them and their heirs to the use and behoof of his said son John and his assigns, for and during the term of ninety-nine years, without impeachment of waste, and from and after the determination of that estate, to the use and behoof of his said trustees and their heirs, during the natural life of the said John Coryton, for preserving contingent remainders; but nevertheless to permit the said John Coryton to take the profits during his natural life; and from and after his decease, to the use and behoof of the first and every other son of the said John Coryton in tail male; and for default of such issue, to the use of the heirs of the body of the said John Coryton; and for want of such issue, to the use and behoof of his daughter Susanna Elliot in tail; and for default of such issue, to the use and behoof of his nephew John Goodal, the plaintiff, for life, &c. taking the name of Coryton; with power to his trustees, until his son should attain his age of twenty- Coryton v. Helliar, 1745, MS. Rep.

seven years, to make leases of the premises, and the like power to his son, upon his attaining the age of twenty-seven; with a power also to his trustees, so long as his son should continue under twenty-seven, to join with him in making a jointure, and after his son's attaining twenty-seven, then to make such jointure himself.

The testator died in 1712, and his son Sir John Coryton died in 1739, without issue, having made his wife executrix and residuary legatee, who died in 1741, and devised the premises to the defendants, for the residue of the ninety-nine years term created by the will of Sir W. Coryton, considering it as an absolute interest for ninety-nine years in Sir J. Coryton, and not determinable upon his death. Susanna Elliot being also dead without issue.

The plaintiff brought his bill to be let into possession of the premises, insisting, that though, as the words of the will stood, there seemed to be an absolute ninety-nine years term given to Sir John Coryton, yet that was only a mistake in the wording of the will, it never being the intention of Sir W. Coryton the testator, that his estate should go into another family, or to any wife his son should happen to marry, which it would probably do, by an absolute devise for ninety-nine years: whereas, by the whole scope of the will, his intent plainly appeared, to continue the estate in his own name and blood, and to give the same to his son only for a term of ninety-nine years, determinable upon his death.

Lord Hardwicke said, the question was, whether this was an absolute term to end only by effluxion of time, or to cease upon the death of Sir J. Coryton. And as on the one hand it must be admitted that there were no express words to determine it, so on

the other it must likewise be admitted that it might be made determinable by other parts of the will, though not expressly limited to be so. This term was not limited to the executors and administrators of Sir J. Coryton, and though not much stress was to be laid on that, yet it was strange that in so verbose a will, these words should be omitted, if the testator intended his son's representatives to take it. The estate limited to trustees was a sufficient estate of freehold to support the contingent remainders, and to preserve the estate to Sir John Coryton for his life, but not to preserve the term from forfeiture for his executors; but was just in the same manner as in a conveyance where the term was determinable; and the limitation also to the first and every other son was the same as in a common settlement. The construction therefore made by the plaintiff answered every purpose of a settlement; and that made by the defendants only, left a dry reversion in the first and other sons, expectant upon a term which might last longer than the lives of the sons or grandsons. Had this been intended for an absolute term, to enable Sir J. Coryton to provide for his younger children, it would likewise have been proper to have provided against the forfeiture of the term, by the trustees, for so many years as were to come of the term; and if, as was admitted by the defendant's counsel, the limitation to the first and other sons, immediately following the limitation of the term, might have determined it upon the death of Sir J. Coryton, the interposing an estate to trustees for preserving contingent remainders should not overturn the whole will, especially as that limitation to the trustees was unnecessary, there being an estate of freehold limited to them before. Indeed, before the statute of uses, an estate in feoffees and

their heirs, to the use of A. for years, remainder to the right heirs of B. who was then living, the contingent remainder was good, because supported by the estate of freehold in the feoffees; but since the statute it was otherwise, and therefore where the first limitation was for life, and a remainder was limited to trustees during the life of the tenant for life, for preserving contingent remainders, and upon further trust to permit the tenant for life to receive the profits to his own use, this was done that if tenant for life should, by making a feoffment, commit a forfeiture, the trustees should notwithstanding suffer him to receive the rents. But where the first limitation was only for years, the remainder to trustees during the life of the tenant for years was inserted purely to support the contingent remainders, which the estate for years could not do; but not with a view of preserving the remainders against the tenant for years, when those very remainders would be void for want of a freehold to support them. At the time of this will made, Sir J. Coryton was but twenty-one, and if this was taken for an absolute term, from the time of his attaining twenty-seven, the testator, instead of giving his estate to his family, would have given it from them for 105 years; which would appear very harsh if Sir J. Coryton had had a son, who might thus have been stripped by an executor. Now the plaintiff was in the same case, being directed to change his name forthwith; and to what purpose should he take the name immediately, if he be not to take the estate for 105 years. Had the testator intended this for an absolute term, there was no occasion to give powers of leasing or jointuring, as both might have been supplied thereout. For though it would not be strictly a jointure within the statute, yet it would

be a good satisfaction of dower in equity; and it was absurd to suppose that he intended this son, whom he would not trust with his estate before 27, should have power to give the whole away for 99 years, even before he was 27. It was said that the testator might intend his son the power of disposing of the estate to the heir of the family, if he should so please, but there was no evidence of such intent; on the contrary he meant to tie him up as fast as possible. And there was as little evidence of the testator's meaning he should have it, to provide for younger children. Then it was objected that here was an absolute term given, which could not be varied or taken away by implication. But in King v. Melling, 1 Vent. 229. we find an express estate for life enlarged to an estate tail; and the same in Langley v. Baldwin, for so was the opinion of the Court of C. B., though in 1 Ab. Eq. 185. by mistake, it is called only an estate for life; which distinguishes it from Bamfield v. Popham, 2 Vern. 427—449, where the limitation was to all and every the son and sons; and though it be said that an estate cannot be enlarged, yet do I find no rule that an estate cannot be abridged by implication; and for instance, a devise to one and his heirs, and if he die without issue to remain over; this abridged the fee to an estate tail. A distinction was made between a necessary and a probable implication, which last only was said to be in this case; but there was no such thing as a natural necessary implication; that being the necessary consideration, which plainly appeared to be the testator's intent, as it was in Langley v. Baldwin. So in the present case what could be more unnatural than to suppose the testator meant to give away his estate for 105 years; and though all he had hitherto said went only on the

infra, c. 12.

supposition of its being but an implication, as the defendant's counsel would have it, yet he thought the question expressly determined by other parts of the will. He thought the cases of Spalding v. Spalding, Cro. Car. 185., and Whaley v. Read, 1 Lutw. 810. applicable to the present. And in Amhurst v. Litton, first heard in 1728, and decreed for the plaintiff; then reheard in 1729, and the former decree reversed; and finally in the House of Lords, it was admitted on all hands, that the testator had power to dispose of the terms; that the words of the devise were very strong, giving them to his mother, for her sole use and benefit; and was urged also to be a great circuity, if intended only to give her the sums secured by those mortgage terms, which might much more easily have been given in money; yet was the last decree affirmed, from the great improbability that the testator meant to give away and sever these long terms from the inheritance.

infra, c. 18.
infra, c. 10.

The authorities quoted for the defendants were first Lanesborough v. Fox, which was decreed upon the too great remoteness of the executory devise. That of Amble v. Jones, which was clearly a fee upon a fee; and Moore, 7., which was likewise a very plain case. One general observation occurred on this will, that it was intended for a family settlement, wherein the limitations were framed as strict as possible. Now suppose this a marriage article, would the Court have decreed a settlement of an absolute term. Even in a conveyance executed, he was inclined to think the Court would have rectified it, because destructive of the whole settlement, as in Uvedale v. Halfpenny, where the term for raising younger children's portions being by mistake placed behind the estate tail, the Court rectified it, although the son, tenant in tail, had

infra, c. 18.

Tit. 32. c. 19. § 28.

suffered a recovery. A distinction was made between settlements and wills, which last it was said must be taken as they are; but this must be understood with some restriction, that the construction be not barely according to the words, but likewise according to the testator's intent; as in Sir J. Hobart v. Lord Stamford, where trustees for preserving contingent remainders were inserted, though not directed by the will; and if there was any doubt, the present case was stronger, because part was executory, as land was to be purchased with the profits.

Upon the whole, therefore, he was of opinion, that this was not an absolute term for 99 years, but that it determined upon Sir J. Coryton's death.

17. A person devised to his wife several freehold estates, until his son T. P. should attain the age of 21 years, in trust to maintain him; and then devised the same to his said son T. P. in fee. But if it should happen that his said wife should be *ensient* with one or more children, at the time of his decease, and his said son T. P. should die without issue, before he attained the age of 21 years, such child or children being then living, he then devised the premises to his wife, till such child or children should attain their ages of 21 years, in trust to maintain them; and then devised the same to such children in fee. But if it happened that his son T. P. should die without issue, and before 21, or that his wife should at the time of his decease, be *ensient* with one or more child or children, who should die without issue, under 21; then he devised the premises to his wife for life; remainder to his nephews in fee.

White v. Barber, 5 Burr. 2703.

The testator at the time of making his will had only one child, the said Thomas; but after the making thereof, and before his death, he had two

other sons born; namely, the plaintiffs, Edward and John. The testator died in 1759, his wife survived him, but was not *ensient* at the time of his death. T. P. died without issue, in 1766. A bill was filed in Chancery by the widow, on behalf of herself and her two infant children; praying that a sufficient part of the rents and profits of the real estate might be applied for the maintenance and education of the two infants.

The Court directed a case, for the opinion of the Court of King's Bench—Whether, in the event that had happened, any and what estate was vested in the widow, and the two infant sons of the testator.

The Judges of the Court of King's Bench certified as follows:—"We are of opinion, that the provision made by the testator, being for children which were to be born after the making of his will, he certainly *intended* to comprehend *all* the children which should be born of his then wife (whether *before* or *after* his decease); for we think that a father, in making an express provision for any children which his wife should be *ensient* with at the time of his decease, could never intend to give his estate to such children, in exclusion of, or to his nephews (as the event has happened) in preference, to any child or children that might be born in his lifetime.

"We are of opinion therefore, that notwithstanding the defect of expression in this will, the children born before the testator's death, are virtually included in the provision so anxiously made by a parent for his posthumous children; and that upon the true construction of this will, the plaintiffs Edward and John, will be entitled, from the testator's manifest intent, to take an estate in fee in the premises at their respective ages of 21; and that in the mean

Doe v. Mackeen, 6 East, 486.

time the plaintiff Eleanor, their mother, is entitled to hold the said premises, subject to the trust of the said will, for their maintenance and education." Doe v. Stenlake, 12 East, 515.

18. The word *or*, has been frequently construed *and*, in a conjunctive sense, where the intention of the testator appeared to require such a construction. The word *or* construed *and*.

19. R. Baker devised lands to his son Richard, and his heirs for ever; and if Richard died within the age of 21 years, *or*, without issue; that then the land should be equally divided amongst his three other sons. Richard the devisee had issue Mary, and died within age. It was resolved, that the word *or*, should be construed as *and*, in a conjunctive sense. Soulle v. Gerrard, Cro. Eliz. 525.

20. A person devised his land to his son and his heirs, and in case his son should die before he attained the age of 21, *or* have issue of his body, then over. The son lived to 28 years, but died without issue. It was resolved, that the will should be construed, as if the words had been; and in case my said son shall happen to die before he attains his age of 21, *and* have issue living. Price v. Hunt, Pollexf. 645.

21. The words of a will were:—"I give the said premises to my grandson, his heirs and assigns; but in case he dies before he attains the age of 21 years, *or* marriage, *and* without issue, then and in such case he devised the same to the defendant." The grandson attained 21, and died, never having been married; and it was insisted that the attaining 21, was a performance of the condition, and vested the estate absolutely in the grandson, under whom the lessor of the plaintiff claimed. Judgment was given accordingly in the county palatine of Durham; whereof error was brought in the Court of King's Bench. After several arguments, the Court affirmed the judgment, upon the authority of Price v. Hunt, where Barker v. Suretees, 2 Stra. 1175. ante, § 20.

the word *or* was construed conjunctively. And they said they would read this without the word *or*, as if it run :—" and if he dies before 21, unmarried and without issue ;" which he did not do, for one of the circumstances failed. And all put together were but in the nature of one contingency; and it was considerable, that this was not a condition precedent, but to destroy an estate, devised by the former words in fee.

Walsh v. Peterson, 3 Atk. 193.

22. A person devised two thirds of his estate *to* his son M. P. to hold to him, his heirs and assigns for ever. But in case his said son should happen to die before he should attain the age of 21 years, *or* without issue, then he gave and devised the said two thirds to his wife. By a codicil the testator reciting this clause, proceeded thus :—" Now my further mind and will is, that in case my said son shall happen to die before the age of 21, or without issue as aforesaid, and also in case of the decease of my said wife, then I give and devise the said two third parts to all the sons and daughters of T. D."

The son died after the age of 21, but without issue; and the question was, whether the devise over to the mother should take effect, upon one of the contingencies happening only.

Lord Hardwicke said, he thought it a very plain case. The testator had a wife and a son living: If he had gone no farther than the first clause, he had given him an absolute fee; but then followed the executory part. Upon the words in the codicil there could be no doubt at all; it was to go over upon two contingencies; the words *as aforesaid* took in all the former disposition. Suppose he had said no more than, in case my son died under 21 *as aforesaid*, would this have disinherited the issue, if the

father had died under 21, and gone over to the mother? By no means; for he would have supplied the words—and without issue; and should have been justified by the expression, *as aforesaid.* He held it to be a vested estate in fee in the son, as he arrived at his age of 21; and that though he died without issue, yet it did not go over to the mother, but descended to his heir at law.

23. A woman devised a house to her son Robert, his heirs and assigns for ever; and in case he should happen to die in his minority and unmarried, or without issue, she gave it over. Framlingham v. Brand, 3 Atk. 390.

Lord Hardwicke held, that the estate was to go over only upon one contingency; that of Robert's dying during his minority, subject to the qualifications of his being unmarried, and without issue at his death; and consequently the estate vested absolutely in Robert, upon his coming of age. Brownsword v. Edwards, infra, c. 20.

24. A person devised to his brother Benjamin Smith all his real and freehold estates; but in case his said brother Benjamin should die before he attained the age of 21 years, or without leaving issue living at his death; then he bequeathed his real estate to his mother. Benjamin Smith the devisee entered into possession of the devised premises, and attained his age of 21 years, but died without issue. Fairfield v. Morgan, Dom. Proc. 1805.

The courts of Common Pleas and King's Bench in Ireland determined, that as the devise over was intended only to take place on the happening of one contingency, consisting of two branches; namely, Benjamin's dying under 21, and without leaving issue; and as in this view only the latter part of the contingency had happened, and the former branch becoming impossible, the devise over could not operate.

On a writ of error to the House of Lords it was contended on behalf of the plaintiff in error that the construction adopted in Ireland was so much against the language of the will, as to be the direct contrary to that which the will peremptorily directed. According to the words, the devise over was to operate on the happening of either of two events; either in the event of Benjamin's dying under 21, or dying without leaving issue. But according to the construction in Ireland, the words of contingency were made to be, —In case my said brother shall die before he attains 21, and without issue. The testator's disjunctive *or* was struck out of the will, and instead of it, the conjunctive *and* was inserted. The testator's two contingencies were consolidated into one contingency; and so the testator was made to speak the very reverse of that, which he had really spoken.

On behalf of the defendant in error, it was said, that the general intent of the testator, as far as it could be collected from the whole will, must prevail, even against any particular clause; which if taken separately might have, or seem to have, a contrary tendency. Now in this case the general intent of the testator appeared with sufficient clearness to have been, to prefer his brother Benjamin and his issue, before his mother; and that the mother was not to take, to the exclusion of the children of Benjamin. This intent, then, ought to be carried into effect, and it could not be carried into effect, without construing the word *or* in a conjunctive sense; since otherwise Benjamin might have died under age, leaving children, and by reason of his dying under age, the children would have been excluded.

Doe v. Halley, 8 Term R. 5.

To give the word *or* a conjunctive sense when the context and intent of the whole instrument required

it, was neither a strained nor a novel construction. There was perhaps no word in the language of more equivocal effect than the word *or*. By a slight variation of the phrase, in almost any case, it might be made to have either a conjunctive or disjunctive operation. A devise over if A. shall die before his attaining his full age, or day of marriage, did not take effect by strict grammar, if A. either came to age or married; but change the expression to,—If A. shall die before attaining his full age, or (*before attaining his*) day of marriage; then in strict grammar the devise over takes effect, unless both happen. Yet the words between the parenthesis, which were used in the latter mode of expression, must be understood in the former, in order to make sense of the passage. The consequence was that courts had at all times paid little attention to a word, the effect of which depended on distinctions so small and subtle; and had construed the sentence in that way which seemed most conformable to sense, without much attention to the conjunctive or disjunctive meaning of the particle used. This had been done even in acts of parliament. In wills it was grown into a settled rule of construction, that where there was a devise of an inheritance to any person, and a devise over, depending on his age, or having issue, whether these two events were connected by a conjunctive or disjunctive particle; the estate of the first taker is absolute, if either of the events takes place; and this for one plain reason, expressed or implied in all the cases, namely, that otherwise if the first taker should die under age, leaving issue, such issue would be disinherited.

Denny. Kemeys, 9 East, 366. Doe v. Jessep, 12 East, 288. Right v. Day, 16 East, 67.

The judgment was affirmed.

25. An estate will be transposed, if the intent of the testator evidently requires it.

Estates sometimes transposed.

Green v. Hayman, 2 Cha. Ca. 10. Fearne Cont. Rem. 495.

A person devised lands to his eldest son for life, remainder to the first and other sons of his said eldest son in tail; remainder to two trustees for their lives, upon trust to support the said remainders. The Court of Chancery held, that the will should be construed so as that the estate devised to the trustees should precede the contingent remainders.

Contradictory Devises. 1 Inst. 112 b. n. 1.

Plowd. 451. Owen, 84.

26. Lord Coke says, where there are two different devises of the same thing, the last shall take place. Mr. Hargrave observes on this passage, that there is a great contrariety of opinion on this subject; that some hold with Lord Coke, that the second devise revokes the first; others think that both devises are void, on account of the repugnancy; but the opinion supported by the greatest number of authorities is, that the two devisees shall take in moieties.

Sims v. Doughty, 5 Ves. 243. 6 Ves. 102.

27. It appears to be settled, that if two parts of a will are totally inconsistent, and cannot possibly be reconciled, the proper rule is, that the latter shall prevail.

A Perpetuity cannot be created by Will.

28. The general principles which have been stated in title 32. c. 23. respecting perpetuities, are as fully adopted in the construction of wills, as in that of deeds. It may therefore be laid down, that lands cannot be devised in such a manner, as to render them unalienable, for a longer period than a life or lives in being, and twenty-one years and nine months after.

Seaward, v. Willock, 5 East, 198.

Doe v. Pearson, 6 East, 173.

29. It was held in a modern case, that a condition against alienation, except to sisters or their children, annexed to a devise to two and their heirs, was good.

Nicolls v. Sheffield, 2 Bro. R. 215. Doe v. Heneage, 4 Term R. 13.

30. A proviso in a will by which an estate was devised in strict settlement, that in case the devisee should come into possession of the family estate, the trustees should stand seised of the devised estate to

the use of the next person in remainder, was held valid by Lord Kenyon, (then M. R.) who said there was no doubt with respect to the validity of the proviso: several estates were held under similar limitations; no rule of law was contradicted by it. And if no recovery was suffered, it might take place at any distance of time.—He might as well be told that an estate tail was an illegal estate, because it might enure for ever.

Tit. 32. c. 23. § 29. Tit. 36. c. 8.

31. Although an omission will be supplied for the purpose of effectuating the intention of the testator; where such intention is consistent with the rules of law; yet if the intention be to create a perpetuity, the omission will not be supplied; but such a construction will be adopted, as will carry the general intention into effect.

32. Joshua Browne devised lands to his nephew William Browne, the son of his brother Reginald, for and during the term of his natural life, and from and after the death of the said W. Browne; then to the first son of the body of the said W. Browne, and the heirs male of the body of such first son; and for want of such issue, then to the second, third, fourth, and every other son and sons of the said W. Browne, according to their seniority; and to the heirs male of the body of such second, &c. and other sons of the said W. Browne; and for want of such issue, to the second son of his brother Reginald, for and during the term of his natural life, and from and after the death of the said second son of his brother Reginald, then to the first son of the body of such second son of his brother Reginald, and to the heirs male of the body of such second son; and for default of such issue, to the third, fourth, fifth, and every other younger son or sons of the said second son of his

Chapman v. Browne, 3 Burr. 1626. 3 Bro. Parl. Ca. 269. Cases and Opinions, vol. 2. 417.

brother Reginald Browne, according to their seniority, and to the heirs male of the bodies of the said third, fourth, fifth, and other sons of the said second son of Reginald; with remainder to the eldest or next son or sons of Reginald for life; and after his or their deaths, to the heirs male of their bodies.

Reginald Browne had no son but William, at the time of the testator's death, but afterwards had a second son named Thomas; William Browne died without issue male; and the question was, what estate Thomas Browne took under the will.

The Court of King's Bench was of opinion, that Thomas Browne took an estate tail. A writ of error was brought in the House of Lords; and the following question was put to the Judges:—"Whether Thomas, the second son of Reginald Browne, took any and what estate, under the will of Joshua Browne." Whereupon the Lord Ch. B. delivered their unanimous opinion—"That Thomas the second son of Reginald Browne took an estate tail under the will of Joshua Browne." Whereupon the judgment of the Court of King's Bench was affirmed.

33. It is perfectly clear that in Joshua Browne's will a line was omitted by which the estate was limited to the first son of the second son of Reginald, and the heirs male of his body, with remainder to the second son of the second son of Reginald, *and to the heirs male of the body of such second son.* But if the omission had been supplied, the devise would have been void, being to an unborn person for life, with a remainder to his first and other sons in tail male; and therefore the Judges rejected the words containing the limitation to the first son of the body of the second son of Reginald, and applied the words,—heirs male of the body of such second son, to the

second son of Reginald, so as to give him an estate tail; as the only mode of effectuating the general intent of the testator; which was to entail his estate on all the sons of his brother Reginald.

Construction *cy pres.*

34. In cases where a perpetuity is attempted, there is a material difference between a deed and a will. In the case of a deed, all the limitations are totally void. But in the case of a will, the courts do not, if they can avoid it, construe the devise to be utterly void, but expound the will in such a manner as to carry the testator's intention into effect, as far as the rules respecting perpetuities will allow; which is called a construction *cy pres.*

Humberston v. Humberston, 1 P. Wms. 332.

35. A person devised his estate to the Drapers company and their successors, in trust to convey the same to his godson M. H. for life, and upon the death of the said M. H. to his first son for life; and so to the first son of that son for life, &c.; and if no issue male of the first son, then to the second son of the said M. H. for life, and so to his first son, &c. On a bill brought for an execution of the trusts of this will, Lord Cowper said, though an attempt to make a perpetuity for successive lives be vain, yet so far as is consistent with the rules of law, it ought to be complied with: and therefore let all the sons of these Humberstons that are already born, take estates for their lives; but where the limitation is to the first son unborn, there the limitation to such unborn son shall be in tail male.

vide Pitt v. Jackson, 2 Bro. R. 51.

Somerville v. Lethbridge, 6 Term R. 213.

36. In a modern case, where there was a devise of land to trustees in fee, in trust for A. an infant, for 99 years, if he should so long live; and after that term to his first, second, third, and other sons, and the issue male of their bodies, for the like term of 99 years, as they should be in seniority of birth. The

Beard v. Westcot, Gilb. Uses, by Sudgen, 270.

Judges of the Court of K. B. certified that the devise to the first unborn son of A. was good; but the subsequent limitations were void.

37. So where there is a proviso in a will, of which the effect would be to prevent a power of alienation, for a longer period than the law allows, such proviso will be deemed void, and the rest of the will good.

Lade v. Holford, 3 Burr. 1416. 1 Black. R. 428. Amb. 479.

38. Sir John Lade devised certain lands to trustees and their heirs, to the use of his cousin John Inskip for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to the use of the trustees and their heirs, during the life of Ann Nutt, in trust to apply the rents and profits for the benefit of such of her sons, or such other person, as for the time being should be in *esse*, and would be the next tenant for life, or in tail, by virtue of the limitations in his will, in case Ann Nutt were dead; and from and after her decease, then to the use of her first and other sons successively in tail: provided that during the time the said John Inskip should be under the age of 26, and so often, and during such time as the person who for the time being would, by virtue of the said will, have been entitled in possession to the devised premises, as tenant for life, or tenant in tail, should be under the age of 26 years, the trustees and their heirs should and might enter on the premises, and take the rents and profits, and apply them to the following uses, viz. to allow to such persons certain annual sums till they attain the age of 26, and to lay out the residue in the purchase of lands, to be settled as the estate devised.

John Inskip died, leaving his wife *ensient* with a son, who, while an infant, exhibited his bill in Chancery, praying to be let into possession of the estate,

when he should arrive at the age of 21. Lord Henley directed a case to be sent to the Court of K. B. for their opinion on this question:—Whether Rose Fuller, the heir of the surviving trustee, did, upon the birth of the plaintiff, take any and what estate in the devised premises by virtue of the said proviso.

It was contended that no estate vested in the trustees, the proviso being void; whether it meant to vest a determinable fee in the trustees, or a mere chattel interest: because in the first case it tended to a perpetuity, by taking away the power of alienation five years longer than the policy of the law admitted; in the latter case, it had the same inconvenience, and was in derogation of the legal powers of tenant in tail.

The Court of K. B. appears to have been of this opinion, for they certified that Rose Fuller did not take any estate in the premises devised, by virtue of the proviso in the will of the said testator.*

39. It has been always held that no averment can be admitted to explain a will; the construction of it must be collected from the words, and not by any averment: for it would be full of great inconvenience that none should know, by the written words of a will, what construction to make, or advice to give, but it should be controlled by collateral averments, out of the will.

No Averment allowed to explain Wills. Cheyney's case, 5 Rep. 68. Plowd. 345.

40. By the statute of frauds and perjuries, it is enacted, "that no will in writing shall be repealed, nor shall any clause, devise, or bequest therein be altered or changed, by any words or will by word of mouth only."

* The doctrine of perpetuities will be more fully considered in the chapters respecting Executory Devises.

Bertie v. Faulkland, 1 Salk. 231.

41. Papers and writings were offered in evidence, to prove what was said to be the intention of a testator. But it was decreed that they should not influence the construction of a will in writing; for that would be to make them part of the will itself. And it is expressly required by the statute of frauds, that every part of a will shall be in writing.

Broughton v. Errington, Tit. 7. c. 3. § 12.

42. The deposition of a person who prepared a will was offered to be read, to prove the declarations of the testator, at the time he gave the instructions for his will, respecting his intention of giving his wife the several devises and bequests mentioned in the will, over and above her jointure: but Lord Bathurst would not suffer such evidence to be read.

8 Ves. 22.

Unless there is a latent Ambiguity. Tit. 32. c. 19. § 51. 5 Rep. 68 *b.* 2 Atk. 372.

43. In the case of an *ambiguitas latens*, an averment supported by parol evidence is admissible, to explain such ambiguity. And therefore if a testator, having two sons of the name of John, devises generally to his son John, there, parol evidence will be admitted, to prove which John the testator meant.

Harris v. Epis. Lincoln, 2 P. Wms. 135.

44. A person being seised in fee, as heir of his mother's mother, devised the lands to trustees in fee, in trust to pay annuities; and the residue to go to the testator's right heirs, of his mother's side, for ever. The testator had two heirs of his mother's side, one who was heir of the mother's father, and the other, heir of the mother's mother. Parol evidence was admitted to prove that the testator, when he made his will, declared that the heir of his mother's mother should have his estate, because it came from thence.

Minshul v. Minshul, 1 Atk. 411.

45. Where parol evidence is admitted to explain a will, it may be encountered by parol evidence.

Jones v. Newman, 1 Black. R. 60.

46. On a motion for a new trial, in ejectment, wherein the lessor of the plaintiff was heir at law, and the defendant's title arose upon a will, which devised

the premises to John Cluer of Calcot, under whom the defendant claimed. The plaintiff gave evidence, that at the time of making the will, there were two John Cluers, father and son, and that therefore the devise was to the father, who died before the testatrix, and so the devise was lapsed and void. Upon which the defendant offered to prove by parol evidence that the testatrix intended to leave it to John Cluer the son. But the Judge would not suffer it; and a verdict was found for the plaintiff. *Per totam curiam*, the Court was mistaken; the objection arose from parol evidence, and ought to be encountered by the same.

47. Parol evidence has also been admitted to clear up a mistake in the description of a devisee. And Sir J. Strange, M. R. has said, that in no instance parol evidence should be admitted in contradiction to the words of a will; but if the words were doubtful and ambiguous, and unless some reasonable light were let in to determine that, the will would fall to the ground; any thing to explain, not to contradict the will, was always admitted. 2 Ves. 217.

48. George Evans devised to his grand-daughter Mary Thomas of Llechlloyd, in Merthyr parish, the reversion of a house. At the time of his death the devisor had a grand-daughter of the name of Elenor Evans, who lived at Llechlloyd in Merthyr parish; and a great drand-daughter, Mary Thomas, an infant of two years, being the only person of that name in the family; but it appeared that she lived at Green Castle in the parish of Llangain, four miles from Merthyr parish; in which latter parish she had never been in her life. Thomas v. Thomas, 6 Term R. 671.

At the trial the plaintiff's counsel proposed giving parol evidence to show a mistake in the name of the devisee; that when the will was read over to the

devisor by Phillips, the person who drew it, and who was dead, the devisor said there was a mistake in the name of the woman to whom the house was given; that Philips then said he would rectify it; but the devisor answered, there was no occasion, as the place of abode and the parish would be sufficient. To this evidence the defendant's counsel objected, contending that there was not that *ambiguitas latens* which authorized the receiving of parol evidence. That if the doubt had arisen from there being two persons of the name of Mary Thomas, parol evidence might be admitted, to explain which of them was meant; but here the inaccuracy of the description was not such as to raise a sufficient degree of doubt to let in the parol evidence, for grand-daughter would properly enough signify great grand-daughter; and the mistake of the residence was only in a matter of description, which was perpetually varying, and could not raise any doubt, where a name, not applicable to any other than the defendant, was used; which was a circumstance of the greatest weight in these cases.

Mr. Justice Lawrence received the evidence, subject to the opinion of the Court on its admissibility, in case the jury should be of opinion that the name Mary Thomas had, by mistake, been inserted, instead of Elenor Evans.

The defendant's counsel then offered evidence of declarations made by the devisor at other times, previous to the making of his will, expressive of his regard for his great-grand-daughter the defendant, and of his intention of giving her the house in question. This was rejected by the Judge, who was of opinion that nothing *dehors* the will could be received to show the intention of the devisor; which could only be collected from the words of the will itself, after the

removal of any latent ambiguity there might be in the description of persons, or other terms used in the will.

The jury found for the heir at law, on the ground that the will was void for uncertainty. Upon a motion for a new trial, Lord Kenyon said, that as there were two parts of the description, not answering to Mary Thomas, who was named in the will, the court was left to conjecture who was meant by the devisor: but the law would not allow an heir at law to be disinherited by conjecture. With regard to the other question, respecting rejection of evidence, the learned Judge did right in rejecting it; the supposed declarations having been made by the testator long before the will was made; though had they been made at the time of making the will, he should have thought them admissible in evidence.

Vide Doe v. Brown, 11 East, 441.

TITLE XXXVIII.

DEVISE.

CHAP. X.

Construction—What words create a Devise, and describe the Devisees, and the Things devised.

2. *What words create a Devise.*
7. *Words of Advice or Desire do not create a Devise.*
14. *But sometimes raise a Trust.*
19. *Devises by Implication.*
25. *What words necessary to describe the Devisees.*
31. *The word Heir.*
43. *The word Issue.*
46. *The words Sons, Children, Relations, &c.*
54. *What words necessary to describe the Things devised.*
55. *Lands, Tenements, and Hereditaments.*
59. *Messuage and House.*
63. *The word Estate.*
67. *All my Rents.*
69. *All I am worth.*
71. *The word Legacy.*
73. *Residue of Estate, Property, or Effects.*
81. *Effect of additional Words.*
88. *Words sometimes applied against their technical meaning.*
91. *General words confined to Freeholds.*
105. *What words necessary to pass Reversions.*
119. *And Mortgages, or Lands held in trust for others.*
128. *And Equities of Redemption.*
129. *And Copyholds.*

Section 1.

HAVING stated the general rules by which devises are construed, it will now be necessary to enquire, 1°. What words are necessary to create a devise. 2°. What words are necessary to describe the devisees. 3°. What words are necessary to describe the property intended to be devised. And, 4°. What words are necessary to denote the quantity and nature of the estate intended to be devised.

2. With respect to the words necessary to create a devise, the proper and technical words are, *give and devise*; but any other words which sufficiently show the intention of the testator, to give all, or any part of his estate, will be sufficient for that purpose. What words create a Devise. 2 Vern. 467.

3. A person having conveyed his estate to feoffees, to his own use, before the statute of uses, made his will after that statute, and also after the statute of wills, by which he willed that his feoffees should make an estate to W. N. and the heirs of his body. This was adjudged to be a good devise of an estate tail to W. N. the intention being clear. Bro. Ab. Devise, pl. 48.

4. A. seised of lands in fee, and having issue two sons, B. and C., devised several estates to B. his eldest son; and directed that B. should renounce all his right in Blackacre, of which the devisor was then seised, to C. This was adjudged to amount to a devise to C. in fee. Hodgkinson v. Star, cited 1 Ld. Raym. 127.

5. A person, after giving by his will an annuity of 200*l.* a year to his wife, and 6,000*l.* to each of his younger children, his just debts being first paid; appointed three persons "as trustees of inheritance for the execution hereof." The question was, whether the trustees took any estate in the testator's real property, so as to render the same chargeable with the annuity and legacies. The Judges of the Court of Common Pleas certified that the trustees took no interest in the real estates. Lord Eldon being dissatisfied with this certificate, directed a case to the Court of King's Bench, who certified that the trustees did take an estate. Lord Eldon confirmed the opinion of the Court of King's Bench, and observed, it was a material fact, that the testator must have known, when he made his will, that his personal estate was insufficient to answer its purposes. Trent v. Trent, 1 Dow. 102.

This decree was affirmed by the House of Lords.

Wright v. Wyvell, 2 Vent. 56. Right v. Hammond, 1 Com. R. 232.

6. A mere recital in a will does not operate as a devise; and therefore in a case where a person being tenant for life, remainder to his wife for life, remainder to his own right heirs; made his will, in which he said, "My lands by Woolwich my wife is to enjoy for her life; after her death of right it goeth to my daughter Elizabeth for ever, provided she hath heirs." It was determined that nothing was devised to Elizabeth; for the will did not give her any estate, but only recited that it was to go to her.

Words of Advice or Desire do not create a Devise.

7. Words of advice, recommendation, or desire do not create a devise; nor will they even operate so as to raise a trust in equity, unless the property is certain, and the persons to whom it is given clearly described; and even in that case, such words are not in general deemed imperative or legatary, where they are inconsistent with the antecedent right or interest devised to that person to whom they are addressed; for in such cases the subject matter of the recommendation having been once absolutely devised away, it cannot be presumed that the testator intended to use his subsequent words of recommendation in a legatary sense, which would be to construe his will as inconsistent with itself, in one and the same sentence.

Palmer v. Schribb, 8 Vin. Ab. 289.

8. A person gave all his estate to his wife; and then said, "I desire and request my said wife to give all her estate, which she shall have at the time of her death, to her and my nearest relations, equally among them."

Lord Harcourt said, the words of the will being so general, both with respect to the money, and the persons to take it, did not amount to a devise; but was only a recommendation to the wife, to make such

a disposition. But if he had desired that she should have given to a particular person; it would have been a good devise, and a trust.

9. Lady Bland devised her manor of Withington, subject to her debts and charges, to her son Sir John Bland, his heirs, executors, administrators, and assigns for ever; and did thereby earnestly request her said son, that in case of failure of issue of his body, he would some time in his lifetime, either by will, or any other writing, convey and settle the said real estate so devised by her to him, or so much thereof as he should stand seised of at the time of his death, so and in such manner as that after failure of issue of his body, the same might come to be enjoyed by her daughter, and the heirs of her body; with several remainders over. Bland v. Bland, Hil. 1745. MSS. Rep.

Sir J. Bland disposed of the manor of Withington by his will.

Lord Hardwicke said, that in law, Sir John Bland clearly had a power of disposing; the devise being to him and his heirs, not subject to any trust: but whether he had such an estate in equity was the doubt; which depended upon the request in Lady Bland's will, whether imperative or not; for if it was the former, Sir J. Bland must then be considered as a trustee for the uses in the will. In order to make such construction, the party must declare his will, and not leave it purely to the option of the devisee, whether he will or will not give the estate. There had been many cases in the Court of Chancery where clauses directory had been taken for a disposition; as in those of Mason v. Limbery, and Massey v. Sherman, where there were the words *trust and confidence*. But as it was so in some instances, it might be otherwise in others; and the request to be com- infra, § 15.

plied with barely at the devisee's discretion. In the present case he thought Lady Bland did not mean her request to her son as imperative, but discretionary; for he was not desired to settle any part of the lands, but might sell the whole if he pleased; and this was a bare request, not obligatory, but subject to his judgment, as to such parts as he should die seised of. He might have sold them for a valuable consideration, might have advanced a son or daughter in marriage with them, or put them to any other use he should think fit. It was said that the debts and charges to which the lands were liable, answered the doubt arising from the words *so much*. But the payment of debts and legacies, had no sort of connexion with, and bore no relation to, the time of his death; which was the only point of time to which the request related. And this brought it very near to the case of the Attorney General v. Hall, before Lord King; where it was held that the absolute property vested in the son, and that he might dispose of it. Here it was not a bare power, but the fee itself that was given; and his power of disposing was not collateral, but flowed from the nature of the estate given him. He was therefore of this opinion upon the penning of the will, by which he did not mean to contradict former cases, wherein there was a desire to settle a particular thing; here being no such desire, either as to any particular part, or the whole, but all absolutely left in Sir J. Bland's power, to dispose of or not, as he should think fit.

Fitzg. 314.

Cunliffe v. Cunliffe, cited Prec. in Cha. 201. n.

10. Sir E. Cunliffe devised certain sugar-houses and stock in trade to his son Sir E. Cunliffe the plaintiff's brother; nevertheless, in case Sir E. Cunliffe should die without a son, he *recommended* it to him to give and devise the said premises to the plaintiff.

It was held by the Lords Commissioners Aston v. Smythe, that the word recommend was not sufficient to raise a trust in favour of the plaintiff.

11. A testatrix gave her fortune to A.; and if he should die without issue, she *recommended* it to him to do justice to B. and her children, if she should think them worthy of it. But if any unforeseen accident should make the whole, or any part, acceptable or serviceable to him, he might dispose of it, if he should think fit. It was held to be no trust. Le Maitre v. Bannister, cited Prec. in Cha. 201. *n.*

12. R. Harland being seised in fee of the manor of Sutton, devised it to his eldest son Philip for life, with remainder to his first and other sons in tail male. Philip entered upon this estate; and being possessed of leasehold estates in Sutton, some for lives, and others for years, by his will gave his leasehold estate for lives to the trustees of his father's will, to the same uses to which the lands devised by the father's will were limited, so far as by law he could. And then followed this clause,—"All my other leasehold estates in the parish or township of Sutton, I give to my brother J. Harland for ever, hoping he will continue them in the family." Harland v. Trigg, 1 Bro. Rep. 142.

Lord Thurlow held, that the will in this instance did not import a devise, as the words did not clearly demonstrate an object.

13. The words, "not doubting but that she (the devisee) will dispose of what shall be left at her death to our two grand-children," were decreed not to amount to a devise. Wynne v. Hawkins, 1 Bro. R. 179.

14. Notwithstanding the authority of the preceding determinations, there are some cases in which words of desire or request have been held to be imperative and legatary, and consequently to create a trust; But sometimes raise a Trust.

Richardson v. Chapman, 7 Bro. Parl. Ca. 318.

where the property was certain, and the objects of the testator's bounty clearly pointed out.

Massey v. Sherman, Amb. 520.

15. A person devised a copyhold to his wife in fee; adding these words, "not doubting but that my wife will dispose of the same to and amongst my children, as she shall please." This was held a trust for the children, as she should appoint.

Harding v. Glynn, 1 Atk. 469.

16. N. Harding devised to Elizabeth his wife all his estate, leases, and interest in his house, &c. "But did desire her, at or before her death, to give such leases, houses, &c. unto and amongst such of his own relations as she should think most deserving and approve of." And made her his executrix. The wife survived; but died intestate. It was decreed, that as the word *relations* was a legal description; this was a devise to such relations, and operated as a trust in the wife, by way of power of naming and appointing; and her nonperformance of the power did not make the devise void, but the power devolved on the court. It was therefore decreed, that the property devised (being personal) should be divided according to the statute of distributions.

Nowlan v. Nelligan, 1 Bro. R. 489.

Bute v. Stuart, 1 Bro. Parl. Ca. 476.

17. E. Wortley devised his collieries and coal mines to trustees, their heirs, executors, administrators and assigns, upon trust to convey and dispose of the same in such manner as his daughter, whether sole or covert, should direct or appoint by any writing or writings under her hand and seal. And in a subsequent part of the will the testator declared, that although his meaning was to give his said daughter the absolute disposal of the said collieries, to prevent the expence and trouble that must attend the management of affairs of such a nature under the direction of the Court of Chancery, he requested his said

daughter to direct the money arising therefrom to be applied in such manner as he had directed the same in default of her direction and appointment.

A question having arisen on the construction of this will, whether Lady Bute had an absolute power of disposing of the collieries, Lord Henley declared that the testator did not intend to empower Lady Bute to direct the trustees to dispose of the premises for her absolute benefit, or without consideration; but that he intended only to give her a power to have the same sold, and that the money arising therefrom should be applied to the purchase of lands, in the same manner as the clear profits of the premises, in case she had made no appointment. And decreed accordingly, which was affirmed by the House of Lords.

18. Doctor Garnet, bishop of Clogher, devised the residue of his personal estate to P. Pierson, his executors, administrators, and assigns, adding these words, —"And it is my dying request to the said P. Pierson, that if he shall die without leaving issue living at his death, that the said P. Pierson do dispose of what fortune he shall receive under this my will, to and among the descendants of my late aunt Ann Coppinger, his grandmother, in such manner as he shall think proper."

Pierson v. Garnet, 2 Bro. R. 38. 226.

It was decreed by Sir L. Kenyon (M. R.), and affirmed by Lord Thurlow, that these words were imperative; and created a trust in favour of the descendants of Ann Coppinger.

Wright v. Atkins, 17 Ves. 255. 1 Ves. & Bea. 313. 9 Ves. 323.

19. The Courts have in some instances allowed of a devise by implication, where it has been very apparent, in order to support and effectuate the intention of the testator; but in cases of this kind, the implication must be a plain, and not merely a possible or

Devises by Implication.

Moon v. —, Willes R. 141.

probable one; for the title of the heir at law being plain and obvious, no words in a will ought to be construed in such a manner as to defeat it, if they can have any other signification. And Lord

1 Ves. & Beam. 466.

Eldon has said—"With regard to that expression 'necessary implication,' I will repeat what I have before stated from a note of Lord Hardwicke's judgement in Coryton v. Hillier; that in

ante, c. 9. § 16.

construing a will, conjecture must not be taken for implication; but necessary implication means, not natural necessity, but so strong a probability of intention, that an intention contrary to that which is imputed to the testator cannot be supposed."

Bro. Ab. Devise, pl. 52. Cro. Ja. 75.

20. The first case in which a devise by implication was allowed, arose in 13 Hen. VII. A man devised his goods to his wife, and that after her decease his son and heir should have a certain house. It was determined that this was a good devise of the house to the wife for life, by implication; for by the express words of the will the heir was not to take it till

Dyer v. Dyer, 1 Merevale 414.

after the death of the wife; therefore if she did not take it, no one else could.

Higham v. Baker, Cro. Eliz. 15.

21. It was also formerly held, that a devise to a stranger, after the death of the devisor's wife, would give the wife an estate for life by implication. But this determination has been repeatedly contradicted; because in this case two implications arise, the one, that the testator meant his lands should go to his wife; the other, that they should descend to his heir: and therefore the implication in favour of the wife being only a possible, and not a necessary one, the title of the heir must prevail.

Smartle v. Scholar, 2 Lev. 207. T. Jones, 98.

22. A person devised to A. and his heirs, after the death of the devisor and his wife.

It was determined that the wife took nothing, but that the lands should descend to the heir, during her life.

23. A copyholder devised underwoods to I. S. for twenty years after the death of his wife, to raise portions for his younger children. The question was, whether the wife took an estate for life by implication. Fawlkener v. Fawlkener, 1 Vern. 21.

Lord Nottingham said, where such a devise was made to the heir, there indeed an estate should arise to the wife by implication; but where it was devised to a stranger, as in this case, there, in the mean time, it should descend to the heir.

24. A person having issue a son, who was his heir apparent, and two daughters, devised in these words: "If it happens my son B. and my two daughters to die without issue, then all my lands shall be and remain to my nephew D. and his heirs." It was held, 1°. That no express estate was by this will given to his children. 2°. That they did not take any estate by implication; because then it must either be a joint estate for life, with several inheritances in tail, or several estates tail in succession. The last it could not be, because it would be uncertain who should take first, who next, &c.; and the first it could not be, because the heir at law shall not be disinherited without a plain implication, which in this case there was not; for it was only a designation and appointment of the time when the land should come to the nephew; and therefore the lands descended to the heir at law. Gardner v. Sheldon, Vaugh. 259.

25. With respect to the words that are necessary in a will to describe the devisees, any words that are sufficient to denote the persons meant by the testator, What words necessary to describe the Devisees.

and to distinguish them from all others, will be sufficient. *Nihil facit error, nominis, cum de corpore constat.*

Gyens v. Kinnesley, Freem. 293.

26. A devise was to Margaret the daughter of W. K. The daughter's name was Margery. It was held she should take; *quia constat de persona.*

Pitcairne, v. Brase, Finch, 403.

27. A person devised an estate to William Pitcairne, eldest son of Charles Pitcairné of Twickenham; who had an eldest son, but his name was Andrew. It was decreed that Andrew should take.

Bate v. Amherst, T. Raym. 82.

28. A person devised all his lands in Kent and Sussex to one of his cousin Nicholas Amherst's daughters, that should marry with a Norton, within fifteen years. N. Amherst had three daughters, one of whom married with a Norton within the fifteen years. This was adjudged a good devise to her, notwithstanding the uncertainty; and that the law would supply the words, who shall *first* marry.

River's case, 1 Atk. 410.

29. A person devised an equal share of his estate to his two sons, James and Charles Rivers. Lord Hardwicke said, the question was, whether as it appeared that James and Charles were two illegitimate children, this was such a description of their persons, as would entitle them to take under the will. In the case of a devise, any thing that amounted to a *designatio personæ* was sufficient: and though in strictness they were not his sons, yet if they had acquired that name by reputation, in common parlance, they were to be considered as such. It had been said, the testator had made a mistake in their names, and therefore they could not take; but the law was otherwise; for if a man was mistaken in a devise, yet if the person was clearly made out

by averment to be the person meant, and there could be no other to whom it might be applied, the devise to him was good.

30. It was held in a late case, that under a devise by a married man, having no legitimate children, "to the children which I may have by A., and living at my decease," natural children who had acquired the reputation of being his children by her, before the date of the will, were entitled, as upon the whole will intended, and sufficiently described. Wilkinson v. Adam, 1 Ves. & B. 422.

But in a subsequent case Lord Eldon held, that under the description of children in a will, illegitimate children, existing at the date of the will, were not entitled, unless proved by the will itself to be intended. And that evidence could be received only for the purpose of collecting who had acquired the reputation of children. Swaine v. Kennerly, Id. 469.

31. In consequence of the rule of law that *nemo est hæres viventis*, an immediate devise to the heirs of a living person would be void. But a devise to the heir special of a living person has been adjudged good; where the word *heir* has been qualified by the words *now living*, or some other circumstances have appeared in the will, to manifest the testator's intention. The word Heir.

32. A person devised to a trustee and his heirs, in trust to permit Robert Durdant to receive the rents during his life, and after his decease, to the heirs male of the body of the said Robert Durdant then living. It was adjudged that this was a vested remainder in the only son of Robert Durdant; the words heirs male of the body then living, being a sufficient designation of such only son, as much as if it had been to his heir apparent. Burchett v. Durdant, 2 Vent. 311.

33. A person devised the remainder of all his estate to the heirs male of the body of his aunt Eliza- Darbison v. Beaumont, 1 P. Wms. 229.

beth Long, lawfully begotten; and gave a legacy of 100*l.* to Elizabeth Long. At the death of the testator, Elizabeth Long was living; and the question was, whether her eldest son could take under this devise. It was adjudged by the Court of Exchequer that he should take. Upon a writ of error in the Exchequer Chamber, before the Ch. Justices Parker and Trevor, this judgment was reversed.

3 Bro. Parl. Ca. 60.

A writ of error was brought in the House of Lords, where the judgment in the Exchequer Chamber was reversed, and that of the Court of Exchequer affirmed; upon the principle that the word *heir* had several significations. In the strictest sense it signified one who succeeded to a dead ancestor; but it also signified, in a more general sense, an heir apparent, which supposed the ancestor to be living; and in this latter sense, the word heir was frequently used in statutes, law books, and records. As therefore the law gave several senses to this word, it would be hard in this case to expound it in the most strict and rigorous sense, which would destroy great part of the will; when by law it might have another sense, which would support the whole will, and the manifest design of the party.

Goodright v. White, 2 Black. Rep. 1010.

34. A person devised to his son Richard Brooking, his heirs male, and to the heirs of his daughter Margaret White, jointly and equally, to hold to the heirs male of Richard lawfully begotten, and to the heirs of Margaret, jointly and equally, and their heirs and assigns for ever. It was resolved, that this was a sufficient designation of the person, to make the son of Margaret take as her heir, living the mother.

Doe v. Ironmonger, 3East, 533.

35. Lands were devised to a trustee, to receive and pay the rents and profits for the maintenance of the devisor's niece Sarah, and the issue of her body, be-

gotten or to be begotten, during the natural life of the said Sarah; and from and after the decease of his niece Sarah, then upon trust for the use of the heirs of the body of his niece Sarah, lawfully begotten or to be begotten, their heirs and assigns for ever; without any respect to be had or made in regard to seniority of age or priority of birth. Sarah had a son and two daughters. The Court said, that the words, "without any respect, &c." plainly showed an intent that the children of Sarah should take as purchasers.

36. It has been already stated to have been formerly held, that where there was a limitation of a remainder in a deed to an heir special, he must answer both parts of the description; but that this doctrine had been altered by a modern decision. In the case of a devise, the same doctrine was held for a long time, but was denied in the following case. Tit. 32. c. 20. § 21.

37. A person devised to his son for life, remainder to his first and other sons in tail male; and for want of such issue, to the heirs male of his body begotten. The devisor died, leaving a grand-daughter, the daughter of his eldest son, his heir at law; and a second son, who died leaving a son. Upon a case sent out of Chancery for the opinion of the Court of King's Bench, the Judges certified, that an estate in tail male passed to the grandson, as heir male of the body of the devisor. Wills v. Palmer, 5 Burr. 2615.

38. A devise to the heirs male of the devisor only extends to the heirs male of his body, and not to a collateral heir; so that if the devisor has not an heir male of his body, the devise is void. Ford v. Ossulston, 11 Mod. 189

39. A person devised his lands to his grand-daughter, who was his heir at law, for her life; remainder to his own right heirs male, for ever; and died leaving his grand-daughter his heir at law, and Dawes v. Ferrers, 2 P. Wms. 1.

a deceased brother's son, being the next in the male line.

Lord Macclesfield held the devise void, because it was to the heirs male, without saying of any body.

8 Vin. Ab. 317.

This cause came on again before Lord Hardwicke, who directed a case to be made for the opinion of the Judges of the Court of King's Bench, who certified that the brother's son could not take by the description of right heir male of the testator.

Roe v. Quartley, 1 Term R. 630.

40. It was held in a modern case, that a devise to the right heirs of husband and wife, was a devise to such person as answered the description of heir to both, namely, a child of both; husband and wife being considered in law as but one person. And where no preceding estate was given to the father and mother, such child should take as a purchaser.

1 Inst. 187 *a*.

Baker v. Wall, 1 Ld. Raym. 185.

41. It was held in a case in 9 Will., that a special heir, though he was not heir general, might take by purchase, under a will, if the devisor expressly exclude the heir general; but a devise in remainder to the right heirs of the testator for ever, his son excepted, is void.

Pugh v. Goodtitle, 3 Bro. Parl. Ca. 454. Fearne, 6th edit. App. 573.

42. C. Ben devised to the eldest son of his son all his estates for life; and for want of heirs in him, to the right heirs of himself C. Ben, the testator, for ever, his son excepted; it being his will he should have no part of his estates, either real or personal. C. Ben, the testator, left a son and three daughters. On a question who was entitled to this estate, the Court of King's Bench determined in favour of the daughters. A writ of error was brought in the House of Lords, where the Judges were unanimously of opinion, that no person took any estate under this will; whereupon the judgment of the Court of King's Bench was reversed.

43. The word *issue* is a sufficient *designatio personæ*, or description of a devisee in a will; and comprises both children and grandchildren. The word Issue.

44. A devise was made to the issue of I. S. who had then a daughter living, and afterwards had a son born. The question was, who should take. Lord Cowper said, that all the children should take, and even grandchildren, if there had been any: and although the devise was to the issue begotten, that made no difference; the words begotten, and to be begotten, were the same, as well in the construction of wills, as settlements, and take in all the issue after begotten; and though, upon the death of the testator, there was then only a daughter born, yet upon the birth of another child the estate should open, and take in an after-born son. Cook v. Cook, 2 Vern. 545.

45. In the case of Loddington v. Kime, a devise to the issue male of E. Armyn, and his heirs for ever, was held to be a good description of the person, and a word of purchase. Tit. 16. c. 1. § 55. 1 Ld. Raym. 205.

46. The words sons, children, relations, and descendants, are sufficient to describe the devisees in a will; provided they can be applied with certainty to persons answering such descriptions. The words Sons, Children, Relations, &c. Doe v. Bagshaw, 6 Term R. 512.

47. Lands were devised to the first son of A. who was not heir at law to A. his father. This was held a good description of the second son. Marwood v. Darrell, Cases temp. Hardw. 91.

48. A person devised to his son Caleb for life, and after his decease to the first, second, third, &c. sons of his body begotten. Caleb had married about two months before the date of the will; he had a son who died soon, and afterwards had another son. Lomax v. Holmden, 1 Ves. 290.

Lord Hardwicke decreed, that the second son should take under the will, as first son; for these words were not to be always taken strictly in the sense

of *primogenitus*, or first-born; but in the sense of an elder son, senior or *maximus natus*.

Tit. 32. c. 21. § 15.

49. It has been stated, that in deeds, as the word *procreatis* extends to issue born after the execution of the deed, so the word *procreandis* will extend to issue born before. This mode of construction is of course extended to wills, in which the words to be begotten, and begotten, have the same sense; and in the preceding case Lord Hardwicke held that doctrine, which has been confirmed in a modern case.

Doe v. Hallett, 1 Maule & Selw. 124.

Pyott v Pyott, MS. Rep. 1 Ves. 335.

50. A person devised her real estate to trustees, in trust for her daughter Martha, with a proviso, that if she died before 21, or marriage, then in trust to convey all the residue of her estate, both real and personal, unto her nearest relation of the name of the Pyotts; and to his or her heirs, executors, administrators, and assigns. The daughter died under age and unmarried.

At the time of the will, and death of the testatrix, her nearest relations of the name of Pyotts were the plaintiff Charles Pyott, and his sisters the defendants Ann and Blanche, who were both then unmarried, but were married at the time of Martha's death. They had besides these another sister, Caroline, who had been married many years before the testatrix's death, and was no party to the suit. The plaintiff had also had an elder brother John, who died before the testatrix, but left issue a son, Richard Pyott, who survived both the testatrix and her daughter, and was heir at law on the part of the mother to the testatrix; and to whom the trustees, after the daughter's death, conveyed the estate in question. This Richard Pyott devised the premises to trustees, in trust for the defendant Pyarea Pyott his wife, and E. Wilmot. The

plaintiff by his bill claimed the testatrix's estate, as the nearest relation of the name of Pyott. The defendants Ann and Blanche, the plaintiff's sisters, insisted that they were entitled equally with the plaintiff; as they were both unmarried, and of the name of Pyott, at the time of the will, and death of the testatrix. And the defendant Pyarea Pyott and E. Wilmot, who stood in the place of Richard Pyott the heir at law, insisted that either he was the person meant by the nearest relation, or else that the devise was void for uncertainty; and so the premises descended to him, as heir to the testatrix on the part of her mother.

Lord Hardwicke said, the first question was, whether the devise was absolutely uncertain, and he thought it was not. It was said, that by the words *nearest relation*, the testatrix meant some single person; but he was of opinion that the word *relation* here was to be taken as *nomen collectivum*, as much as kindred or heir. Suppose the devise had been to her nearest kindred, no doubt that it would have taken in several persons: wills and acts of parliament, Lord Coke tells us, were to be taken according to common parlance, and the word relation was often used instead of kindred, it being common to say, such an one has a numerous relation, whereby were meant many; and it was good English. But the present case differed from all that had been cited, because the personal estate was involved in the same devise with the real, and had this been a bequest only of personal estate, all those who were of the name of the Pyotts in an equal degree, and were of the nearest stock to the testatrix, would have taken by virtue of the statute of distributions; and if it was clear who should take the personal estate, it naturally inferred

whom the testatrix meant should take the real, there being but one intent as to both; and this of the personal was a proper key to explain how the real estate was intended to go.

The next question was, who was to take? At the time of making the will, there were three persons in equal degree of the name of Pyott, and a fourth who had been so, but was married: two of the three married before the happening of the contingency, upon which they were to take, and so lost their name; whence it was insisted by the plaintiff, that these, not being of the name when the contingency happened, could not claim with him, but he alone was entitled; and for this was cited Jobson's case, Cro. Eliz. 576. He was not well satisfied with that determination; for what was meant was a description of the person, without any regard to the continuation of the name; and had the daughter been unmarried at the devisor's death, she would immediately have taken, nor could her subsequent marriage make her lose her right; it being immaterial, if she was to change her name, at what time she did it. But that case differed from the present, being a remainder to the next of his kin, of his name, after an estate tail to A. Taking therefore the word relation to be *nomen collectivum*, there was no ground to construe this description to refer to the very name of Pyott, but rather to be a description of the stock, and as if she had said the stock or blood of the Pyotts. For taking it otherwise, and suppose some nearer relation of the testatrix, but of another name at her death, had afterwards changed by act of parliament his former name to Pyott; or if a woman had married some man of the name of Pyott, but no way related to the testatrix, such a one would certainly not be entitled to take; and yet

Bon v. Smith, Cro. Eliz. 532.

every argument drawn from the bearing the name of Pyott, at the happening of the contingency, would hold equally strong for him or her, as it did for the plaintiff's taking alone, in exclusion of his sisters. This showed it therefore to be too narrow a construction, and that the word relation and name meant the stock of the Pyotts; which she meant to distinguish from any other stock of consanguinity to her. It was like a devise upon condition to marry a person of the devisor's name: the devisee married a man who had changed his name to that of the devisor: held, this was no performance of the condition, for that *name* meant family. The personal estate was coupled with the real, and one rule must govern both, and the sister that was married was, he thought, equally entitled to take with the plaintiff, and the two other sisters. The testatrix had made no provision that the persons taking should continue to bear the name; and therefore the plaintiff and his three sisters should take equally.

Marsh v. Marsh, 1 Bro. R. 293.

51. A testator devised his estate to three persons for life, and after their death, to the descendants of Francis Ince, then living in and about Seven Oaks, in Kent.

Crossly v. Clare, Amb. 397.

Sir T. Clarke, M. R. said, that a devise to descendants at large had been good; here the devisor added a description of such as he intended should take, which was sufficiently precise and certain: it would be unjust to confine it to the heirs at law, because the word descendants meant all those who proceeded from his body, and therefore the grandchildren of Francis Ince were entitled: but a great grandchild, being born after the will made, was excluded by the words, *then living*.

Leigh v. Leigh, 15 Ves. 92.

52. Lord Leigh devised his estates to his sister Mary Leigh, in strict settlement; remainder "unto the first and nearest of his kindred, being male, and of his name and blood, that should be living at the determination of the several estates therein-before devised, and to the heirs of his body lawfully begotten."

It was held by Lord Eldon, in conformity to the opinions of Mr. Justice Lawrence and Mr. Baron Thompson, whom he had called to his assistance, that a person claiming under this limitation must be of the name, as well as the blood; and that the qualification as to the name was not satisfied, by having the name taken by the King's licence, previous to the determination of the preceding estates.

Doe v. Over, 1 Taunt. 263.

53. A person devised all his freehold estates to his wife during her natural life; and at her decease to be equally divided amongst the relations on his side. It was held, that all those should take who would be entitled to personal estate under the statute of distributions, that is, first cousins; as well in the paternal as in the maternal line. And the devise spoke at the time of the testator's death, not at the time of framing the devise; therefore one who was related in equal degree at the time of making the will, having died before the testator, leaving a son, the son was held not entitled to a share, as a relation.

What words necessary to describe the Things devised.

54. With respect to the words that are necessary to describe the property intended to be devised; as a will is always construed in the most favourable manner, for the benefit of the devisees; the same accuracy is not required in the description of those things which are intended to be devised, as is necessary in a deed; it being enough if the words denote, with sufficient certainty, what is meant to be given.

55. The words lands, tenements, and hereditaments, will pass every species of property. And in a modern case it was determined that money, directed to be laid out in the purchase of land, would pass by the words lands, tenements, and hereditaments whatsoever and wheresoever. Lands, Tenements, and Hereditaments. Rushley v. Masters, 3 Bro. R. 99.

56. The words, all my lands, are sufficient to pass a house. If, however, it appears not to have been the intention of a testator to give a house by those words, they will not have that effect. Cro. Eliz. 477.

57. A person being seised of a house in Dale, and of three houses and certain lands in Sale, devised his house in Dale and all his lands in Sale to B. It was resolved that the houses in Sale did not pass, on account of the express mention of the house in Dale; for, *expressum facit cessare tacitum*: and if the testator had intended to devise the houses in Sale, he would have mentioned them, as well as he did the house in Dale. Ewer v. Hayden, Cro. Eliz. 476.

58. One Bishop being seised of divers lands called Hayes Lands, which extended into two vills, Cokefield and Cranfield, devised all his lands in Cokefield, called Hayes Lands, to his youngest son and his heirs; and in another part of his will he devised, that if his youngest son died without issue, his wife should have Hayes Lands. Woodden v. Osborn, Cro. Eliz. 674.

The question was, whether the wife should have Hayes Lands in Cranfield, or only in Cokefield. And it was resolved by the whole Court, that she should have that only which was in Cokefield, because there was no more devised to the youngest son. But Popham said, if the devise had been to the eldest son, and that if he died without issue, his wife should have Hayes Lands, there peradventure she should have all; because the eldest son had all,

the one part by devise, the other by descent; and she should have all which he had.

Messuage and House. Carden v. Tuck, Cro. Eliz. 89.

59. A devise of a messuage will carry with it the curtilage and garden annexed, even without the word appurtenances; for they are part of the messuage.

2 Cha. Ca. 27.

60. It was formerly held that the word *house* did not, in a will, carry the garden or curtilage belonging to such house, without the word appurtenances; but this doctrine is now somewhat altered.

Doe v. Collins, 2 Term R. 498.

61. A. being tenant for years of a house, garden, stables, and coal-pen, occupied by him, devised in the following words: "I give the house I live in and garden to B."

It was resolved that the stables and coal-pen passed, they not being specifically given in the subsequent part of the will; though the testator used them for the purpose of trade, as well as for the convenience of his house.

Buck v. Norton, 1 Bos. 53.

62. In a subsequent case it was determined by the Court of Common Pleas, that lands usually occupied with a house, did not pass under a devise of a messuage with the appurtenances; it not appearing that the testator meant to extend the word appurtenances, beyond its technical sense.

The word Estate.

63. The word estate will pass every kind of property, unless restrained by other words.

Bridgewater v. Bolton, 1 Salk. 236.

64. The Earl of B., by his will, gave part of his personal estate to his son-in-law, and then added these words: "And all other my estate, real and personal." The question was, whether fee farm rents passed by this devise.

Barnes v. Patch, 8 Ves. 604.

Lord Holt delivered the opinion of the Court, that the rents passed by the words, all my real and per-

sonal estate; for the word estate was *genus generalissimum*, and included all things real and personal.

65. Even the words personal estates will pass freehold lands, if it appear that the testator used them in that sense. Doe v. Tofield, 11 East, 246.

66. But where a person gave 4,000 *l.* to trustees in trust for certain persons, and by a residuary clause gave all the res of his estate and effects, of what nature soever, to A. and B., their executors and administrators, in trust to add the interest to the principal, so as to accumulate the same; it being his will that the residue should not pass, but at the time and manner as the principal sum of 4,000 *l.* was directed to be paid. It was held that these words did not extend to a freehold house, of which the testator was seised. And Lord Kenyon relied on the following words of the clause, "to add the interest to the principal, so as to accumulate the same." The interest and principal were to make one consolidated sum of the same nature; but these were terms wholly inapplicable to a real estate. Doe v. Bucknor, 6 Term R. 610.

67. The words, all my rents, are sufficient to pass real estates; for it is according to the common phrase and usual manner of speaking of some men, who name their lands by their rents. All my Rents.

68. A person having let several houses and lands for years, rendering several rents, made his will in these words: "As concerning the disposition of all my lands and tenements, I bequeath the rents of D. to my wife for life, remainder over in tail." The question was, whether by this devise the reversions passed, with the rents of the lands. For it was contended that the rents, divided from the reversions, were not devisable within the statute, the devisor having no reversion therein. Kerry v. Derrick, Cro. Ja. 104.

The Court resolved that the land itself passed by the devise; for it appeared to be the intention of the testator to make a devise of all his lands and tenements, and that he intended to pass such an estate as should have continuance for a longer time than the leases should enure; and the words were apt enough to convey it, according to the common phrase and usual manner of some men, who name their land by their rents.

All I am worth.

69. The words, all I am worth, without any other words to control them, will pass real as well as personal estate.

Huxlop v. Brooman, 1 Bro. R. 437.

70. A testator having given all the overplus of his money to the son and daughter of I. S., proceeded in these words, "I give and bequeath to them all I am worth, except 20*l.* which I give to my executor." It was contended, that there being no expression in the will which pointed at the real estate, the personalty could only pass. But it was decreed that these words carried both the real and personal estate.

The word Legacy.

71. The word *legacy* may be applied to a real estate, if the context of the will show that such was the testator's intention.

Hardacre v. Nash, 5 Term R. 716.

72. A. by will gave two legacies of 150*l.* each to his son and daughter, to be paid when they attained the age of 21. He then gave all his realty and personalty to his wife for life, and after her death he gave one freehold estate to the son, and another to the daughter; but if either or both of his children should die before the wife, then those legacies which were left to them should return to the wife.

Lord Kenyon said, the question was, whether those words of remainder operated on the real estates before given to the son and daughter, or only referred to the pecuniary legacies. The Court had considered

the whole of the will, and was of opinion that those words acted upon the real estates before given to the son and daughter. Considerable stress had been laid on the word *legacies*, and it was argued that it was an appropriate term, applicable to personal estate only. But the same technical and correct expressions were not to be expected from unlettered persons, as were usually found in wills drawn by professional men. Even if there were no decision to warrant the Court in saying, that the word legacy might be applied to a real estate, if the context required it, he should have had no difficulty in making such a determination for the first time. But that construction had already been put on the word legacy in the case of Hope v. Taylor; and the Court fully subscribed to the doctrine there laid down.

infra, c. 12.

Residue of Estate, Property, or Effects.

73. The words, all the residue or remainder of my effects, my estate, or, my property, will pass real estates of every kind.

Roe v. Harvey, 5 Burr. 2638.

74. A person devised all the rest and residue of his estate, whatsoever and wheresoever, to his wife. It was contended that the word estate did not necessarily mean real estate; but Lord Mansfield answered, that the word estate carried every thing, unless tied down by particular expressions.

Doe v. Chapman, 1 H. Black. 223.

75. A person devised all the rest and residue of her estate, of what nature or kind soever. It was contended that these words only applied to the personal property of the testator, because they were accompanied with limitations peculiar to personal property. But the Court said, they could not restrain the meaning of those words to personal property, and negative the operation of them as to real estates.

Jackson v. Hogan, Cowp. 299.

76. G. Jackson being seised of several real estates, descendible freeholds, and chattels real; gave to his mother, Mary Jackson, some particular estates for life, without liberty of committing waste; he afterwards gave several legacies and an annuity of 30*l.* to his heir at law, and then proceeded thus,—"I also give and bequeath unto my dearly beloved mother Mary Jackson, all the remainder and residue of all the effects, both real and personal, which I shall die possessed of."

The question was, whether this last clause passed all the testator's freehold estates to his mother in fee simple.

The Court of King's Bench in Ireland gave judgment in favour of the heir at law. This was reversed by the Court of King's Bench in England; upon which a writ of error was brought in the House of Lords.

3 Bro. Parl. Ca. 388.

It was contended on behalf of the appellant to be an established rule, that an heir at law should not be disinherited but by express words, or necessary implication. The residuary clause in this case contained no express devise of the real estates; the word *effects* being properly applicable only to personal estate. The subsequent words, "which I shall die possessed of," supported and strengthened this construction; because the express allusion of those words to a future acquisition was inapplicable to real estates, as none acquired after the publication of the will could pass by it; and the word *possessed* properly related only to personal estate; as to the word *real*, annexed to the word effects, it applied expressly to the chattels real left by the testator: nor was there any necessary implication that any greater interest in

the real estates was intended for the mother, than the estate for life, without power of waste, expressly devised to her, in two of the denominations. Such an implication, so far from being necessary, was incompatible with, and would merge and destroy, and in fact revoke, the mother's express estate for life, and restriction from waste; and would break through another rule, as well of law, as of common sense, which says, that what is expressed shall not be destroyed by implication.

Another rule of construction was, that where words used by a testator are indifferently applied to real and personal estates, they should not, if there was any thing to satisfy them, receive a construction prejudicial to the heir. Now in the present case the words bequeath, effects, and possessed of, were indisputably much less applicable to real, than to personal estate; they had never been admitted to apply to the former, but where insurmountable arguments of such an intent, afforded by other parts of the will, rendered that construction necessary. But here the other parts of the will were so far from requiring such a construction, that they were destroyed if it were admitted. The words, in their most proper sense, applied to personal estate; and the chattels real which the testator left, showed his reason for annexing the word real to effects, which otherwise properly meant moveables only; and fully satisfied those words: they could not therefore be extended to real estates.

It was also an established rule that general words in one part of a will should be so construed as not to defeat the plain intention of the testator, to be collected from any other part of his will. Now in the present case the devise to the mother for life, without power of waste, was incompatible with an intent on

to give her the same lands in fee; and therefore the residuary clause must be so construed as to avoid this inconsistency.

On the other side it was contended, that it was manifest the testator did not mean to die intestate, as to any part of his real property; not only from the expressive words in the residuary clause, but also from the introductory words of the will, "as to my worldly substance;" which had been always understood to consist of real and personal estate; and to indicate an intent in the testator who used them, to dispose of all his property. The testator's first devise to his mother was only of a part of his real estate; creditors were entitled to another part, that is, so much as would be sufficient by sale, to discharge their incumbrances; the legatees were entitled to a further part thereof; yet there still remained some part to dispose of; and this remainder the testator had, with perfect consistency, given to his mother, by the residuary clause. The views with which he made these two devises were sufficiently obvious; by the former, in all events, and subject to no incumbrance, he made a provision for his mother; by the latter, he gave her the residue which might remain, after all the incumbrances should be discharged. He had not therefore given *part* and the *whole* to his mother.

In this case the heir at law was disinherited, both by express words, and by necessary implication; for, in the residuary clause, the testator had made use of the most expressive and comprehensive words, in giving to his mother the whole remainder of his real property.

Doe v. Lainchbury, 11 East, 290.

The Judges having been consulted, the Lord Chief Baron delivered their unanimous opinion, that Mary Jackson took an estate in fee in all the testator's

property, under the residuary clause: and the judgment of the Court of King's Bench in England was affirmed. Doe v. Trout, 13 East, 394. Morgan v. Surman, 1 Taunt. 289.

77. Where the words, residue of my estate, property, or effects, appear, from the context of the will, to have been confined by the testator to personal property only, they will not be construed to extend to real estates.

78. A man having settled all his estate of inheritance on his wife for life, for her jointure, made his will, and thereby devised several pecuniary legacies; and then said,—"All the rest and residue of my estate, chattels real and personal, I give and devise to my wife." The question was, whether the reversion of the jointure lands passed to the wife. Lord Harcourt decreed it did not, because the precedent and subsequent words explained his intent to carry only his personal estate: for in the first part of the will, having given only legacies, and no land, the words, all the rest and residue of his estate, were relative, and must be intended estate of the same nature with that he had before devised, which was only personal; for having before given no real estate, there could be no rest or residue of that, out of which he had given away none. Then the words, chattels real and personal, explained the word estate, and showed what sort of estate he meant; and made the devise as if he had said, all the rest of my estate, whether chattels real or personal, &c.; and so confined and restrained the extended sense of the word estate. Marlant v. Twisden, 1 Ab. Eq. 211.

79. A testator devised as follows: "All those my freehold lands and hop grounds, with the messuages or tenements, barns, &c. in the tenure of L.; and all other the rest, residue, and remainder of my estate, Timewell v. Perkins, 2 Atk. 102.

consisting in money, plate, jewels, leases, judgments, mortgages, &c. or in any other thing whatsoever or wheresoever, I give to A. B. and her assigns for ever." Justice Fortescue, at the Rolls, held that the residue of the testator's real estate did not pass by this devise; for although the word estate, when unrestrained, would include lands as well as personal estate, yet here it was expressly confined to personals, as plate, &c.; and had the testator intended to give all his real estate, why did he mention a part of it only.

Camfield v. Gilbert, 3 East, 516. Goodtitle v. Miles, 6 East, 494. Doe v. Weatherby, 11 East, 322. Williams v. Thomas, 12 East, 141.

80. In a modern case the Court of King's Bench held, that the words, residue and remainder of effects, did not extend to real estates; from the apparent intention manifested by the testator, of not extending the word effects to real estates.

Effect of additional words. Tit. 32. c. 19.

81. With respect to additional words, the courts appear to have always been disposed to adopt the rule established for the construction of deeds: namely, that where there is a correct and specific description of the property devised, a mistake in any additional words will have no effect. But where the first description is merely general, there additional words will be considered, either as explanatory or restrictive, according to the intent of the testator. Thus in the following cases a mistake in the additional words was held to have no effect.

Chamberlain v. Turner, Cro. Car. 129.

82. A person being seised in fee of a house called the White Swan, in Old-Street, devised it in these words: "I devise the house or tenement wherein William Nichols dwelleth, called the White Swan, in Old-Street, to H. G., my daughter's son, for ever." The jury found that the said W. Nichols, at the time when the will was made, and when the testator died,

occupied the alley of the said house, and three upper rooms; and that divers other persons occupied the garden, and other places in the said house.

The question was, whether all the house passed, or only the entry, and the three rooms which were in the possession of W. Nichols.

The Ch. J. Hyde doubted; but Jones, Whitlocke, and Croke were of opinion that all the house passed to the devisee; for the devise being, "that house or tenement," and the conclusion, "called the White Swan," did both of them necessarily import the whole house. For the sign of the White Swan could not be intended to refer to the three rooms: and the words after, viz. "wherein W. Nichols dwelleth," did not abridge or alter that devise; and the house being named by the particular name of the White Swan, although W. Nichols never inhabited it, but only occupied three rooms, passed by the devise. If the house had not been described by the particular name of the White Swan, and the testator had devised the house in the occupation of W. Nichols, there, peradventure, it should not extend to more than what was in the occupation of W. Nichols. Blague v. Gold, Cro. Car. 447.

83. A testator devised all the profits of his houses and lands lying in the parish of Billing, and in a street there called Brooke-street, to his wife: when in truth there was no such parish as Billing; but the land supposed to be devised was in Billing-street. All the court held the will to be good. Pacy v. Knolls, Brownl. 131.

84. A person made his will in these words: "I devise to J. S. all those my lands in Bramstead, in the county of Surry, in the possession of John Ashley;" whereas, in fact, the testator had not any lands in Surry; but he had lands at Bramstead in Hampshire, in the possession of John Ashley. In an ejectment brought Hastead v. Serle, 1 Ld. Raym. 728.

for these lands in Hampshire, by the heir of the testator, against the devisee; it was ruled by Lord **Holt**, that they passed by the devise.

Hill v. St. John, Cowp. 94.

85. Sir B. Broughton Delves, having entered into written contracts for the purchase of the manor *of* Clatford, and the manor of Abbots Ann, and also the advowson of the parish church of Abbots Ann, and having puschased the advowson of Mottisfont, which was actually conveyed to him, all which estates and advowsons were in the county of Hants, made his will, in which were the following words: "I give and devise all the manors, messuages, *advowsons*, farms, lands, tenements, &c., situate and being in the county of Hants, for the purchase whereof I have already contracted and agreed."

The question was, whether the advowson of Mottisfont, which had been actually conveyed to the testator at the time of making his will, passed by this devise.

2 Black. Rep. 930.

The Court of Common Pleas was unanimously of opinion that the advowson did not pass by the will; for the testator spoke only of those estates in Hants which were under contract, not those of which the sale was completed.

Upon a writ of error in the King's Bench, this judgment was reversed; upon the principle, that the Court could not reject the word advowsons in the plural number; as it appeared the testator meant the word advowsons should have its full force and effect.

3 Bro. Parl. Ca. 375.

On a writ of error in the House of Lords, the judgment of the Court of King's Bench was affirmed, with the concurrence of a majority of the Judges present; but contrary to the opinion of Lord Chancellor Apsley and Lord Camden.

Doe v. Greathead, 8 East, 91.

86. In the following case additional words were held to be explanatory, and not restrictive of the preceding ones.

87. Doctor Paul devised to his wife his farm at Bovington, in the tenure and occupation of J. Smith. He devised to her several other estates in the same manner; and concluded by a general devise to her of all his freehold and copyhold lands above devised. The farm at Bovington was copyhold, and was demised to J. Smith, with an exception of the woods and underwoods.

Paul. v Paul, 2 Burr. 1089. 1 Black. R. 255.

The heir at law brought an ejectment for the woods; and the question was, whether they passed by the will, not being in the tenure and occupation of J. Smith.

Lord Mansfield held, that the words, "in the tenure and occupation of J. Smith," were not words of restriction, but of additional description. Had the testator meant them as restrictive, he would have said,—all that part of my farm, or so much of my farm, as is in the tenure, &c. The farm was an entire thing. Judgment was given for the devisee.

Doe v. Parkin, 5 Taunt. 321. Marshall v. Hopkins, 15 East, 309.

88. The courts have gone so far, as to determine that where the words used by a testator are only applicable, in their strict technical sense, to a species of property which the testator has not, they shall be applied, if possible, to some other species of property, which the testator has; in order to effectuate his intention. For in cases of this kind, it is clear the testator has been ignorant of the technical meaning of the words which he used; but as he must have had some intention when he used them, the courts, in order to give effect to that intention, will apply such words to the property to which the testator appears to have intended to apply them.

Words sometimes applied against their technical Meaning.

Inchly v. Robinson, 3 Leon. 165.

89. A person being seised of a fee-farm rent issuing out of the manor of F., and having no land or manor, devised his manor of F. to J. S. It was held that these words passed the fee-farm rent; for the devisor being seised of that rent, and of nothing else in the manor, it was plain he meant the rent, and could mean nothing else; so that otherwise the will must have been entirely void.

Day v. Trig, 1 P. Wms. 286.

90. A person devised all his freehold houses in Aldersgate Street to the plaintiff and his heirs. The testator had no freehold houses there, but had leasehold houses. It was decreed by Mr. Justice Tracy, that though in a grant of all one's freehold houses, leasehold houses could not pass; and that in the case of a will, had there been any freehold houses to satisfy the will, the leasehold houses should not have passed; yet the plain intention of the testator being to pass some houses, and he having no freehold houses there, the word freehold should rather be rejected, than the will be wholly void, and the leaseholds should pass.

infra.

General words confined to Freeholds.

91. Where a testator uses general words, equally applicable to freehold and leasehold property, they have in general been restrained to freeholds, where the testator has both freehold and leasehold property, unless a contrary intention appears; and are only applied to leasehold property where the testator has no freehold property to satisfy them.

Rose v. Bartlet, Cro. Car. 292.

92. It was resolved by the Court of King's Bench in 8 Cha. I. "that if a man hath lands in fee, and lands for years, and deviseth all his lands and tenements, the fee simple lands pass only, and not the lease for years. And if a man hath a lease for years and no fee simple, and deviseth all his lands and te-

nements, the lease for years passeth; for otherwise the will should be merely void."

93. Lady Boreman being seised in fee of lands in Kent, and possessed of a mortgage for years in Essex, and also of an extended interest upon a statute in Bucks, devised all her manors, messuages, lands, tenements, hereditaments, and real estate whatsoever, in Kent, Essex, Bucks, Bedfordshire, or elsewhere in the kingdom of England, of which she was any ways seised or entitled to, unto her nephew. By a latter clause the testatrix gave all the rest, residue, and remainder of her personal estate, plate, gold, &c. and all her mortgages, bonds, specialties, and credits, whatsoever they should consist of, to her nephew and niece. Davis v. Gibbs, 3 P.Wms. 26.

The question was, whether the chattel interests of the testatrix passed by the first clause in the will.

Lord King decreed that they did not; and this decree was affirmed by the House of Lords.

94. The doctrine established in the two preceding cases has been in some degree contradicted by the three following cases, in which general words have been applied both to freehold and leasehold property.

95. T. Addis being seised in fee of some lands, and possessed of other lands under a lease for twenty-one years, all in the possession of A. B.; and it being very difficult, by reason of long unity of possession, to distinguish the freehold from the leasehold premises; devised all his messuages, lands, and tenements, in the parish of D. which he then stood seised or possessed of, or any ways interested in, and which were in the possession of A. B., unto his wife Jane for her life; remainder to his brother, and the heirs of his body; remainder over. Addis v. Clement, 2 P. Wms. 456.

Lord King said, the question was, whether the leasehold passed with the freehold; he owned the limitations were improper, but then the words were very strong;—all the lands which the testator was seised or possessed of, or any ways interested in; which words, possessed of or interested in, properly referred to a leasehold estate; and distinguished this case from that of Rose v. Bartlet, where the words possessed of, or any ways interested in, were not to be found. And as the lease for twenty-one years was held of the church, and always renewable, the lessee, who was the testator, might look upon himself, from the right he had to renew, as having a perpetual estate therein, a kind of inheritance; therefore the leasehold premises ought to pass by the will. And decreed accordingly.

Lowther v. Cavendish, Amb. 356.

96. Sir J. Lowther having freehold and leasehold estates in the county of Cumberland, devised in these words: "I give all my manors, lands, tenements, mines of coal and lead, rents and hereditaments whatsoever, in Cumberland, to J. Lowther in tail. And whereas I am owner of several burgage tenures in Cockermouth, it is my will they shall not be entailed, as I have done my other estates in Cumberland; and therefore I devise them to Sir W. Lowther and his heirs."

A question arose, whether the leasehold estates passed by the devise to J. Lowther, or to Sir W. Lowther, the residuary legatee.

Lord Keeper Henley said, it was plain from the clause excepting the burgage tenures, that the testator thought he had entailed these leaseholds upon James Lowther. The word estates in the will was a general term, and comprehended both freehold and leasehold, and was not restrained to either. But it was said that

he having both sorts of estates, by the general words, estates of inheritance only passed, according to the case of Rose v. Bartlet, a single authority, where it was held, that the words *lands and tenements* related to estates of inheritance only. That resolution might be law in that particular case, though he could see no reason why those words should not include leaseholds too, as they had been held to do where other words were added, as in Addis v. Clement; *lands in which he was any ways interested.* In the present case there were words inserted which were material to pass leaseholds, as mines, rents; which it would be strange to suppose him to devise, without the lands of which they were the profits, and from whence they flowed. He could never intend to give them in the residuary clause, after he had before specifically devised every estate he had.

97. A testator being seised of tithes in fee, and having a lease of other tithes for years, perpetually renewable, without fine, devised all his lands, tenements, tithes, &c. to the defendant. The plaintiff, being the personal representative of the testator, filed his bill for the leasehold tithes; insisting that the freehold tithes only passed by the will. Turner v. Husler, 1 Bro. R. 78.

Mr. Baron Eyre, sitting for the Chancellor, said the case of Rose v. Bartlett had been often referred to and acknowledged; one could not but respect a case so supported, yet one could not help asking why, by so general an expression, all the lands should not pass. No reason was given in the cases; there was none arising from the favour shewn to an heir at law; for the ordinary or next of kin were not considered in that light. There was none from the general rules of construction. If the words were the same, and the testator had only one interest, that

to give her the same lands in fee; and therefore the residuary clause must be so construed as to avoid this inconsistency.

On the other side it was contended, that it was manifest the testator did not mean to die intestate, as to any part of his real property; not only from the expressive words in the residuary clause, but also from the introductory words of the will, "as to my worldly substance;" which had been always understood to consist of real and personal estate; and to indicate an intent in the testator who used them, to dispose of all his property. The testator's first devise to his mother was only of a part of his real estate; creditors were entitled to another part, that is, so much as would be sufficient by sale, to discharge their incumbrances; the legatees were entitled to a further part thereof; yet there still remained some part to dispose of; and this remainder the testator had, with perfect consistency, given to his mother, by the residuary clause. The views with which he made these two devises were sufficiently obvious; by the former, in all events, and subject to no incumbrance, he made a provision for his mother; by the latter, he gave her the residue which might remain, after all the incumbrances should be discharged. He had not therefore given *part* and the *whole* to his mother.

In this case the heir at law was disinherited, both by express words, and by necessary implication; for, in the residuary clause, the testator had made use of the most expressive and comprehensive words, in giving to his mother the whole remainder of his real property.

Doe v. Laiuchbury, 11 East, 290.

The Judges having been consulted, the Lord Chief Baron delivered their unanimous opinion, that Mary Jackson took an estate in fee in all the testator's

property, under the residuary clause: and the judgment of the Court of King's Bench in England was affirmed. Doe v. Trout, 13 East, 394. Morgan v. Surman, 1 Taunt. 289.

77. Where the words, residue of my estate, property, or effects, appear, from the context of the will, to have been confined by the testator to personal property only, they will not be construed to extend to real estates.

78. A man having settled all his estate of inheritance on his wife for life, for her jointure, made his will, and thereby devised several pecuniary legacies; and then said,—"All the rest and residue of my estate, chattels real and personal, I give and devise to my wife." The question was, whether the reversion of the jointure lands passed to the wife. Lord Harcourt decreed it did not, because the precedent and subsequent words explained his intent to carry only his personal estate: for in the first part of the will, having given only legacies, and no land, the words, all the rest and residue of his estate, were relative, and must be intended estate of the same nature with that he had before devised, which was only personal; for having before given no real estate, there could be no rest or residue of that, out of which he had given away none. Then the words, chattels real and personal, explained the word estate, and showed what sort of estate he meant; and made the devise as if he had said, all the rest of my estate, whether chattels real or personal, &c.; and so confined and restrained the extended sense of the word estate. Markant v. Twisden, 1 Ab. Eq. 211.

79. A testator devised as follows: "All those my freehold lands and hop grounds, with the messuages or tenements, barns, &c. in the tenure of L.; and all other the rest, residue, and remainder of my estate, Timewell v. Perkins, 2 Atk. 102.

Lord Hardwicke observed, that as the facts were not fully before him, it must go to a trial at law. He stated the rule laid down in Rose v. Bartlet, and said, "Though in the present case I have no doubt at all as to the intention of the testator, yet the rule of law would prevail."

Pistol v. Riccardson, 1 H. Black. 26. *n.* 2 P. Wms. 459. *n.*

100. A testator being seised of freehold estates of considerable annual value, and also possessed of two terms for years, devised all his manors, and all and every his several messuages, lands, tenements, and hereditaments whatsoever, and wheresoever, which he was seised of, interested in, or entitled to, lying and being within the several counties of N. E. &c., to his son for life, with impeachment for all wilful waste; and from and after his decease, to the heirs of his body.

This case was twice argued in K. B. The Court, upon very full consideration, and with some reluctance, determined that the two leasehold farms did not pass by this devise. Lord Mansfield, in delivering the judgment of the Court, stated the will at length, and said he did so in order to show that there were no words in the will, except the devise itself, which indicated any intention in the testator to convey the leasehold premises; and that although the words of the devise were very comprehensive, yet a system of legal construction had been established in former cases, especially Rose v. Bartlet and Davis v. Gibbs, which precluded them from considering the intention of the testator on the words of the devise, as they might otherwise have done, and bound them in the decision of the principal case.

101. The rule laid down in Rose v. Bartlet has been, in some degree, departed from by the Court of K. B. in the following case :

102. H. Bosville being seised of several freehold estates, and possessed of a part of a farm held under the church for 21 years, renewable, held with another part of the farm, and let together as one; devised all his manors, messuages, houses, *farms*, lands, woodlands, hereditaments, and real estate whatsoever, to R. B. for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail, remainder over; and gave all the rest and residue of his ready money, rents in arrear, stock in the public funds, jewels, and personal estate, to R. B. for ever. Lane v. Stanhope, 6 TermR. 345.

Upon a question, in a suit in Chancery, whether the word *farms* carried the leasehold under the first devise, a case was sent to the Court of K. B. for their opinion.

Lord Kenyon said, he would say a few words to show the foundation of his opinion. It was the duty of the Court, in construing a will, to give effect to the devisor's intention, as far as they could, consistently with the rules of law, not conjecturing, but expounding his will from the words used. Where certain words had obtained a precise technical meaning, they ought not to give them a different meaning; that would be, as Lord King and other Judges had said, removing land-marks: but if there was no such appropriate meaning to the words used in a will, if the devisor's intention was clear, and the words used were sufficient to give effect to it, they ought to construe those words so as to give effect to the intent, and not to doubt on account of other cases, which tended only to involve the question in obscurity. On the whole of this will, taking it together, he had no doubt. The devisor had two kinds of property, real and personal. It appeared by the

case that a part of a farm held by lease under the archbishop of Canterbury had been for a long course of years in the testator's family, and was considered almost equivalent to a perpetuity, on account of the covenant to renew, and that as far as it could be traced, it had been let by the testator and his family together with the rest of the farm, which was an estate of inheritance, and which belonged to them, as one farm, to the same tenant, under one integral rent: every one must be aware of the inconvenience of splitting this farm, on account of the apportionment of rent, and the power of distress; and perhaps it would be difficult for either party to occupy it beneficially. The testator, having this various property, sat down to make his will, and he devised all his manors, messuages, or tenements, houses, farms, lands, woodlands, hereditaments, and real estate whatsoever and wheresoever, unto R. B. &c. In many cases that might be put, he should not lay much stress on the word *farm*; whether it should have much or little weight must depend upon the subject. Then, after giving some pecuniary legacies, the testator added a residuary clause, by which he gave all the rest and residue of his ready money, rents in arrear, stock in any of the public funds, jewels, and personal estate, unto R. B. &c. Now if this will were to be read by any person not fettered with legal and technical notions, he would not hesitate about the intention, but would say that all the landed property, without considering the circumstances of that landed property, was disposed of by the first clause, and all the personal property by the last. It was material to observe that the first words in the residuary clause applied to money, after which it was not to be supposed that the testator intended

to recur to the land; he having in the former part of his will used words sufficiently comprehensive to include every species of landed property. He admitted that several of the limitations which were applied to real estate, were inapplicable to the species of property in dispute; but he thought it would be too much to say that that observation alone should preclude the idea that the testator intended to pass the leasehold part of the farm, under the words used in the first clause; as it was well known how frequently many of the limitations used in a will were inapplicable to every species of property disposed of by it. He did not wonder that the Court determined the case of Pistol v. Riccardson with reluctance, for it appeared that that case came before the Court at several different times. He only lamented that the case of Addis v. Clement was not then cited; for Lord Mansfield seemed to feel himself pressed, by a torrent of authorities, to decide contrary to his better judgment. And he could not forbear thinking, that if Addis v. Clement had been mentioned, the Court would have decided the other way with less reluctance. The reason why they determined in that case that the leasehold farm did not pass by that will was, because they thought that all the words there used had received in other cases a certain technical construction, and therefore that they were bound by those decisions. But the Court had not that difficulty to encounter in this case, because here they find another word in the will, *farms*, which in its general signification means that which is held by a person who stands in the relation of tenant to a landlord. The extrinsic circumstances also weighed strongly in this case. Therefore, taking into consideration the residuary clause, in which the *items*

enumerated were all personal chattels, and that the testator did not mean to die intestate as to any part of his property, though the property in dispute was a personal estate, yet as it was connected with land, he thought the construction that the family had put upon the whole will was the true one.

The following certificate was afterwards sent to the Court of Chancery:—"We have heard this case argued, and considered the effects of this will, and are of opinion, taking the whole will together, that the leasehold property in question is not included in the residuary bequest, but passed by the prior devise; although some of the limitations applied to the real estates are inapplicable to this species of property."

103. In a subsequent case Lord Ch. J. Eldon and the other Judges of the Court of Common Pleas held that the rule laid down in Rose v. Bartlet was a rule of property not to be shaken; and therefore that under a general devise, leaseholds did not pass, unless there was something to show an evident intention that they should pass.

Thompson v. Lawley, 2 Bos. 303. 5 Ves. 476.

104. Mr. Thompson being seised of the manor of W. and other freehold estates in Yorkshire, and possessed of two leasehold houses; devised his manor of W., and all other his manors, messuages, lands, tenements, and hereditaments, to trustees and their heirs, to the use of his first and other sons of his body in tail male, with several remainders over, in strict settlement; and devised all his money, securities for money, goods, chattels and effects, and all other his personal estate, not before disposed of, to his brother and sister.

Upon a case sent by the Court of Chancery to the Court of C. B. the question was, whether the leasehold passed under the first general devise.

Lord Eldon stated the reasons for the certificate; and after observing that Lord Kenyon had said in the preceding case, that it was the duty of courts of justice to give effect to the devisor's intention, as far as they could consistently with the rules of law, not conjecturing but expounding his will from the words used; and that he was particularly impressed with the latter expression, "not conjecturing, but expounding his will from the words used;" he said, that whether the rule laid down in Rose v. Bartlet were wisely adopted or not, it was unnecessary to determine; but that case having once established a general rule, he had rather consent pointedly and avowedly to contradict that rule in terms, than to acknowledge it in words and deny it in effect, by raising distinctions which in fact made it impossible for any man to decide in any particular case, what was the legal construction of a will, as to this point, till he had obtained the authority of a court of law, in a judgment upon the will, for the opinion which he gave. That it did not appear that there was any equitable right of renewal, nor even the premises in question blended, in enjoyment or otherwise, with any freehold land; there was no difficulty in distinguishing them from each other, they had never been demised together, at one rent, reserved to heirs; they were short terms. No one of those particular circumstances which were relied upon in former cases existed in this. It was the simple case of terms for years, and a case of property, *prima facie* that sort of property which a disposition of personal estate must be intended to pass. That the estates included in the general devise were limited to the issue of the devisor in tail, with several remainders over. He entered into an examination of all the preceding cases, and concluded by saying,—"The rule in Rose

v. Bartlet is a rule which has been acknowledged for ages, and upon which I shall act, until I am informed by the highest authority that I am no longer to regard it: till I shall be so informed, I shall substantially regard it in judgment; for I think it better to over-rule it altogether, which I must not do, than to deny to it its effect, upon grounds which do not completely satisfy my mind, as solid and safe grounds of distinction."

All the other Judges said the rule in Rose v. Bartlet ought not to be shaken; and the Court certified that the leasehold houses did not pass by the general devise.

What words necessary to pass Reversions.

105. With respect to the words necessary to pass estates in reversion, wherever a testator shows an intention to dispose of all his property by his will, and uses words sufficient for that purpose, any estates to which he is entitled in reversion will pass.

Wheeler v. Waldron, Allen, 28. 3 P. Wms. 63. *n.* E.

106. A person having a manor and other lands in Somersetshire, devised the manor to A. for six years, and part of the other lands to B. in fee, and then came this clause: "And the rest of my lands, in Somersetshire or elsewhere, I give to my brother." It was adjudged that the reversion of the manor passed by the word *rest*.

Cooke v. Gerrard, 1 Lev. 212. Saund. 180.

107. A person settled part of his lands on his daughter for life, and devised another part to his wife for a year after his death; and then devised all his lands, not settled or devised, to T. K. and his heirs. Adjudged, that the reversion of the lands settled on his daughter, passed by this devise.

Rook v. Rook, 2 Vern. 461.

108. A person being seised in fee, devised Blackacre to A. for life, and devised to B. all his lands not before devised, to be sold, and the money to be divided between his younger children. The question was,

whether the reversion of Blackacre passed by the devise of all his lands not before devised; and it being referred to the Judges of C. B., they certified that the reversion was well devised.

109. A person devised a house to A. and his wife for their lives; and then, the better to enable his wife to pay his legacies, he devised to her all his messuages, lands, tenements, and hereditaments whatsoever, within the kingdom of England, not before disposed of, to hold to her and her heirs. It was also found that the testator left sufficient to pay his legacies, without the reversion of the house. Willows v. Lidcot, 2 Vent. 285. 3 Mod. 229.

The Court of King's Bench determined that the reversion of the house did not pass; but this judgment was unanimously reversed in the Exchequer Chamber.

110. A person who was tenant for life, remainder to his first and other sons in tail, with the reversion in fee in himself, having a son and daughter, devised all his lands, tenements, and hereditaments to his daughter in fee, in case his son should die without issue. The son did die without issue; and Lord Holt said, though the testator had only a dry reversion in fee, yet that by the words, all his lands, tenements, and hereditaments, such reversion would pass. Dalby v. Champernon, Skin. 631. Fletcher v. Smiton, infra, c. 11.

111. The words, all my lands out of settlement, and also the words, not by me formerly settled, will comprehend reversions in fee after estates tail.

Sir W. Lytton being tenant in tail after possibility, of some lands, remainder in fee to trustees, in trust for himself and his heirs; and being also tenant in tail of some other lands, remainder to the right heirs of his father, and having no issue, devised all his messuages, lands, tenements, and hereditaments whatsoever, *out of settlement*, to his nephew Falkland v. Lytton, 3 Bro. Parl. Ca. 24. S. C. 2 Vern. 621.

Lytton Strode, and his heirs. The question was, whether the different reversions, to which he was entitled, should pass by this will.

Lord Cowper, assisted by the Master of the Rolls, Lord Ch. J. Trevor, and J. Tracy, decreed that the reversions passed by the will. And on an appeal to the House of Lords, this decree was affirmed, upon the principle, that by the words, lands out of settlement, the reversion in fee passed; for the same lands may be said to be settled and unsettled, namely, settled as far as the use thereof is limited, and unsettled as to the reversion.

Chester v. Chester, 3 P. Wms. 56.

112. Sir J. Chester, on the marriage of his eldest son, settled lands of 800*l. per annum* on his eldest son for life, remainder, as to part, to the wife of his son for life, remainder to the first and other sons of that marriage in tail male, remainder to his son and his heirs male on any other wife, remainder to himself in fee. And being seised in fee of other lands in possession, in Littleton, Marston and Milbroke; he devised all his lands, tenements, and hereditaments in these three places, *or elsewhere, not by him formerly settled, or thereby by him otherwise disposed of,* to trustees for a term of 100 years, upon the trusts therein mentioned, remainder to his younger son in fee.

The eldest son died leaving six daughters; and the question was, whether the reversion of the estate, settled on the eldest son, should pass by this devise.

It was decreed by Lord King, assisted by Lord Raymond and another Judge, 1st. That the word *elsewhere* was the same as if the testator had said he devised all his lands in the three places particularly mentioned, or in any other place whatever; and that there was no reason to reject so plain, proper,

and intelligible a word in a will as this, which probably was inserted to avoid the prolixity of naming the several other places in which the premises lay; it being a great estate, and difficult, at the time of making the will, when the testator might be supposed to be *inops consilii*, and without his writings, to particularize all the towns. That the word *elsewhere* was therefore the most significant, sensible, and comprehensive word that could be used for that purpose, equivalent to the naming of them. And it would be of the most dangerous consequence, under pretence of construing this will, and assisting the testator's intentions, to reject a word so material to be made use of, both for the sake of brevity and security.

2dly. That the words, *not otherwise by me settled*, could have excepted only that estate in the lands which was otherwise before settled; whereas it was plain that the reversion in fee was not settled, and therefore ought to pass by the will. The reversion in fee of the lands in question not being settled, the lands, as to such reversion, were not settled; so that the same lands in several respects, might be said to be settled and unsettled; viz. with regard to all the particular estates which were limited, the lands might be said to be settled; though with regard to the reversion in fee, it might be properly said, that the lands were not settled; and the reversion in fee which remained unsettled, was part of the old estate, whereof the owner continued seised.

Glover v. Spendlove, 4 Bro. R. 337. S. P.

113. Mr. Tracey being seised of estates in the counties of Gloucester and Worcester, and also entitled to the reversion of certain estates in the counties of Oxford and Wilts, devised all and every his manors, messuages, lands, tenements, hereditaments, and premises in the counties of Gloucester

Freeman v. Chandos, Cowp. 363.

and Worcester, and elsewhere in the kingdom of England, to trustees, subject to certain charges thereon, and to certain limitations and estates to all his brothers, by his marriage settlement. The estates in the counties of Gloucester and Worcester were the only ones charged or mentioned in his marriage settlement. The question was, whether the reversion in fee of the estates in Oxfordshire passed by the will.

It was contended, that from the words of the will referring to the limitations of the estates in Gloucestershire and Worcestershire, and the charges thereon, it was manifest the testator had no other estates than those in contemplation at the time of making his will. But the Court of King's Bench certified, that the reversion in fee of the estates in Oxfordshire and Wiltshire passed by this devise.

Atkyns v. Atkyns, Cowp. 808.

114. E. Atkyns, being seised in fee in possession of the manor of Cotes, and to an estate there called Pinbury Park; and being likewise entitled to the reversion in fee of the manor of Sewell, in the said county of Gloucester, expectant on the estates tail of three persons then living, made his will, and thereby devised as follows:—"I give, devise, and bequeath all that the manor or lordship, or reputed manor or lordship of Cotes, in the county of Gloucester, with the rights, royalties, and appurtenances, and also all and every the messuages, farms, lands, tenements, advowsons, and hereditaments whatsoever of me, the said E. Atkyns, situate, lying, and being within or adjoining to the said manor or lordship, and also all that my capital messuage or tenement, and all and every my lands, tenements, and hereditaments whatsoever, whether freehold or leasehold, situate and being at or in or near Pinbury Park, or elsewhere in

the said county of Gloucester, with their appurtenances; and all my estate, term of years, and interest therein, unto and to the use of my executors, &c." Upon trust to sell the same for the benefit of his younger children.

Several years after the death of the testator, the reversion of the manor of Sewell came into possession; and a question arose between the heir at law and the younger children, whether it passed by the will. A case was made by Lord Thurlow for the opinion of the Court of King's Bench, who certified that it did pass to the executors by the express words of the will.

The Chancellor ordered, that the Judges' certificate should be confirmed. From this order an appeal was brought to the House of Lords: and a question having been put to the Judges, whether the reversion of the manor of Sewell passed by the will, the Lord Chief Baron delivered their unanimous opinion, that the reversion in fee of the manor of Sewell passed by the will; whereupon the decree was affirmed. 3 Bro. Parl. Ca. 408. Doe v. Meakin, 1 East. 456. S. P.

115. It has been held in two modern cases, that where there are general words in the residuary clause of a will, they will carry every estate and interest which is not expressly, or by necessary implication, excluded from its operation; and will therefore carry all reversions. Goodright v. Downshire, 2 Bos. 600. Doe v. Weatherby, 11 East, 322.

116. As the intention of the testator is the rule by which wills are always construed, where it is manifest that a testator does not intend to devise a reversion by general words, such reversion will not pass.

117. A. Mervin, on the marriage of his eldest son Henry, settled the manor of Arlestown on himself for life, remainder to his son Henry for life, remain- Teat v. Strong, 2 Burr. 912.

der to the first and other sons of Henry in tail, &c. with the reversion in fee to the father. A. Mervin had issue three other sons, Audley, James, and Theophilus, and four daughters; and being seised of other lands in fee simple, he made his will, by which he devised all those lands whereof he was seized in fee simple in possession to his wife; and also all other the lands, tenements, and hereditaments whereof he was seised in fee simple, or of which any other person was seised in trust for him; with a proviso, that if his sons Henry and Audley (who were his first and second sons) should both of them die without issue male, in the lifetime of his son James, (who was his third son) whereby the estate settled on his son Henry on his marriage should descend on his son James, that then his son James should not take any interest or estate in the lands therein-before devised to him.

The question was, whether the reversion in fee of the lands which were settled on Henry should pass by this devise. The Court of King's Bench in Ireland gave judgment that the reversion in fee did pass; but this judgment was reversed by the Court of King's Bench in England; and Lord Mansfield, in delivering the opinion of the Court, observed, that the words used by the testator were certainly sufficient to carry the reversion in fee of the lands settled on Henry, if they had not been restrained by other words and expressions; and that the clause in the will (besides several others) which directed that in case Henry and Audley should die without issue male in the lifetime of his son James, whereby the estate settled on Henry should descend to James, then James should not take any estate in the lands devised to him, proved to a demonstration that the testator did not

mean to devise this reversion; for if he had, then it could never go to James. A writ of error was brought in the House of Lords; and the Judges having given their opinion that the reversion in fee did not pass by this devise, the judgment of the Court of King's Bench in England was affirmed. 3 Bro. Parl. Ca. 219.

118. A person being seised in tail of an undivided fourth of an estate, and entitled to the reversion in fee of another fourth, expectant on the determination of an estate tail, reciting that she was entitled to an undivided fourth of an estate, &c., which she thought was an estate in fee, devised it to a trustee in fee, upon several trusts: and then came the following clause—"And all the rest, residue, and remainder of my estate and effects, I direct to be sold and disposed of, as soon as may be after my decease, and thereout the expences of my funeral to be paid, &c." Roe v. Avis, 4 Term R. 605.

The Court of King's Bench held that the reversion did not pass; for although those general words were sufficient to pass a fee, in order to answer the purposes of the will; yet in this case they said it was manifest that this estate was not in the contemplation of the testatrix when she made her will, it being only a reversion expectant on the determination of an estate tail, which her aunts might have barred; and the testatrix having by the former part of her will disposed of all the freehold estate to which she supposed herself entitled. They observed that it was clear from the purpose to which a part of the produce of what she directed to be sold was to be applied, namely, the paying of her funeral expences, that she only meant to dispose of something which could be sold immediately; and that this reversion might never have descended to her heirs.

And Mortgages, or Lands held in trust for others.

119. It was formerly held that lands mortgaged might be devised by the mortgagee, by the words, all my mortgages. But afterwards the courts laid it down, that these words would only comprehend mortgages for years, and not mortgages in fee, especially if they were forfeited.

Wilkinson v. Merryland, Cro. Car. 447.

120. A person seised of divers lands in A., B., and C.; the lands in C. being in him by mortgage, and forfeited; made his will; and after devising the lands in A. and B. to several persons and their heirs, he gave all the rest of his goods, chattels, leases, estates, mortgages, debts, ready money, plate, and other goods, whereof he was possessed, to his wife, after his debts and legacies were paid; and made her his executrix. The Court doubted whether the estate in mortgage passed to the wife, because the word mortgage was coupled with personal things; and because the testator used the words,—whereof he was possessed.

Wynne v. Littleton, 1 Vern. 3.

121. A person who was seised of lands in fee, and of mortgages in fee, devised all his lands to A. B., and gave several legacies, and then said, "All the residue of my estate I give to my executor." It was resolved, that the mortgage went to the executor. But if the testator had only devised his lands, without giving any legacies, and had bequeathed the rest of his personal estate to his executors, there perhaps the mortgaged lands would have passed to A. B., for else there would be nothing to answer and make sense of the clause, "all the residue;" for that implied that he had already devised some part of his personal estate; or at least it showed that he intended part of it should have passed.

122. This doctrine, however, has been entirely altered; for the nature of mortgages being now clearly

ascertained, and the whole transaction till foreclosure being considered as a personal engagement only, in which the money is the principal, and the conveyance of the land only an accessary, it is fully established that neither the general words, lands, tenements, and hereditaments, nor any other words particularly appropriated to the description of real estates, will carry mortgages in fee, if the testator has other property to satisfy those words. Tit. 15. c. 2. § 35.

123. A person being seised of several freehold manors, and of a great personal estate, made his will, and after devising part to his wife for life, gave all other his lands, tenements, and hereditaments, out of settlement, to his nephew. The testator afterwards foreclosed and got releases of the equity of redemption of some mortgages in fee. One of the questions in this case was, whether these mortgages passed by the will under the words, lands, tenements, and hereditaments; and it was agreed by the Lord Chancellor, assisted by the Master of the Rolls, and two Judges, that mortgages in fee, although forfeited when the will was made, did not pass by those words. Strode v. Russell, 2 Vern. 621. 1 Atk. 605.

124. If a testator has no other property answering the description given in his will, in point of situation and other circumstances, except mortgages, they will pass by general words, though not particularly adapted to the subject, because otherwise the will would have no effect. ante,

125. A person possessed of a mortgage of the Swan Inn, at Chelsea, made his will, and thereby devised to A. and his heirs "all his freehold messuages and garden grounds at Chelsea." It was held by Lord Hardwicke, on a question whether the mortgaged interest would pass by this description, that as Clarke v. Abbot, 2 Ab. Eq. 606.

it did not appear the testator had any other lands there, it certainly would.

1 Inst. 205 *a.* n.

126. Various opinions have been entertained, within these few years, respecting the question, whether a general devise passes lands whereof the devisor is only mortgagee or trustee. In a case before Lord Rosslyn in 1800, it was contended that general words did not pass an estate held in trust for another, unless there appeared to be an intention that it should pass; to which his Lordship said, that was certainly the understanding; but perhaps the most convenient rule would have been the reverse, as it might be more easy to find a devisee than an heir. Lord Redesdale, who was then Attorney General, suggested, as *amicus curiæ*, that the rule, that an estate held in trust should pass by a general devise, would not be the most convenient, from the frequent instances of estates tail created by general words, in consequence of which the legal estate might get into an infant, fettered with an entail.

Att. Gen. v. Buller, 5 Ves. 339.

Braybroke v. Inskip, 8 Ves. 417. Roe v. Reade, 8 Term R. 118.

127. In a subsequent case, the Master of the Rolls, Sir W. Grant, having determined that an estate held in trust passed by the general words of a will; on an appeal to Lord Eldon, he said,—"I am disposed in this cause to concur with the opinion of the Master of the Rolls, meaning rather to state my judgment that the rule is not, that in every case where general words are used, the property shall or shall not pass; but that in each case you must look at every part of the will for the intention with regard to such property. I do not know in experience any case in which the proposition is laid down so strong one way or the other, as it was laid down in the Attorney General v. Buller. I know no case which states as the rule, that trust estates shall not pass, unless the

intention that they should pass appears; and I incline to think they will pass, unless I can collect from expressions in the will, or purposes or objects of the testator, that he did not mean they should pass. In this case there is no circumstance, except one, that I shall observe upon, denoting any special intention. It is the case of a dry trust, all the debts and legacies being long paid, as I now understand. There was therefore a pure legal estate in the testator, nothing remaining to be done but to reconvey. There is no one circumstance in this will to cut down the general effect, upon any notion of intention, unless it can be said, that where he meant to create a trust, viz. as to the personal estate, he joins another person with his wife, giving the real estate to her alone; but that is too thin an evidence of intention, to afford much inference.

The result is this: a will containing words large enough, and no expression in it authorizing a narrower construction than the general legal construction, nor any such disposition of the estate as is unlikely for a testator to make, of any property not in the strictest sense his, as complicated limitations; nor any purpose at all inconsistent with as probable an intention to vest it in his wife as devisee, as to let it descend. I know of no case in which a mere devise in these general terms, without more, where the question of intention cannot be embarrassed by any reasoning upon the purpose or objects, or the person of the devisee, has been held not to pass the trust estate. If there was any such case, I would abide by it; but I do not feel strong enough upon authority or reasoning to dissent from the decision of the Master of the Rolls.

And Equities of Redemption.

128. Lands which are in mortgage, and whereof the devisor has only the equity of redemption, will pass by the same words as estates in possession: because lands mortgaged are only considered as a pledge for securing the repayment of a debt, and remain in the mortgagor for every other purpose.

Philips v. Hele, 1 Cha. Rep. 101.

And Copyholds.

129. With respect to the words which are necessary to pass copyholds; it is laid down by Lord Hardwicke, that where copyhold lands are surrendered to the use of a will, they pass by a general devise of all the testator's lands and tenements; notwithstanding there are freeholds to answer such devise. But where copyholds have not been surrendered to the use of the testator's will, they do not pass by general words; because the want of a surrender renders it doubtful whether the testator intended to dispose of his copyholds or not.

Tendrill v. Smith, 2 Atk. 85. Godwyn v. Godwyn, 1 Ves. 226.

ante, c. 4.

Milbourn v. Milbourn, 2 Bro. R. 64.

130. A person being seised of real estates in Huntingdonshire and Cambridgeshire, and possessed of copyholds in those counties, devised all his messuages, farms, lands, tenements, and hereditaments, with the appurtenances, in Huntingdonshire and Cambridgeshire, to his wife for life, &c. The copyholds were not surrendered to the use of his will; and therefore the Master of the Rolls (Lord Kenyon) held, they did not pass by it.

Lindopp v. Everall, 3 Bro. R. 188.

131. A person devised to trustees all his messuages, cottages, lands, tenements, hereditaments, and real estate whatsoever, situate within the parishes of N. &c., and also all his messuages, &c. in S. and P., upon trust to sell and dispose of the same, to pay his debts and legacies. The question was, whether a small copyhold estate, which was supposed to be freehold, passed.

Lord Thurlow held, that it did not pass: for though, where the copyhold is necessary to pay debts, it is held equivalent to a description of it, yet here, it not being necessary for that purpose, it should not pass, for the further purpose of going to the younger child.

Church v. Mundy, 15 Ves. 396.

132. A person devised in the following words:— "I give to my son Henry all my lands, tenements, and hereditaments, in possession and reversion, freehold and copyhold, in the parish of Chiswick, or elsewhere in the county of Middlesex, (which copyhold lands I have surrendered to the use of my will,) to him and his heirs."

Gascoigne v. Barker, 3 Atk. 8.

Lord Hardwicke held, that the words in the parenthesis were to be taken as restrictive of the first words of the devise; so that the devise should be construed only to extend to copyholds actually surrendered, and not to any others.

Wilson v. Mount, 3 Ves. 191. S. P.

133. In the case of Rumbold v. Rumbold, the copyholds, not having been surrendered, were held not to have passed by the will.

ante, c. 4. § 43.

134. Where a testator had freehold, customary, and copyhold estates, and devised two rent-charges out of all his real estate, and also two copyholds in Middlesex for lives, and subject thereto, devised all his freehold manors, lands, &c. in Yorkshire; it was held that certain customary estates which the devisor had together with freehold property in Yorkshire did not pass by these words: for as the lands were holden by copy of court-roll, and passed by surrender and admittance, and were generally reputed and called copyholds; and the testator having distinguished in other parts of his will between copyhold and freehold he must be pre-

Roe v. Vernon, 5 East, 51.

sumed to have used the word freehold in its usual and popular signification, as not including these customary estates, considered by himself as copyholds.

TITLE XXXVIII.

DEVISE.

CHAP. XI.

Construction—What words create an Estate in Fee Simple.

2. *Words shewing an intention to give the whole Interest.*
19. *Words of Reference.*
21. *Effect of an introductory Clause.*
25. *The word Estate.*
32. *All my Real Property.*
34. *The words Right, Title, and Interest.*
36. *All the Rest and Residue of my Estate.*
43. *Whatever else I have not disposed of.*
45. *The words Remainder and Reversion.*
48. *Devise on condition of paying a Sum of Money.*
53. *Or charged with Debts and Legacies.*
60. *Or with an Annual Payment for ever.*
64. *Or for the Life of a Third Person.*
72. *A Devise with a Limitation over.*
76. *Devise to Trustees for purposes requiring a Fee.*
80. *What words pass the whole Interest in a Chattel.*

Section 1.

WITH respect to the words which are necessary to denote the quantity of estate or interest intended to be given by the testator to the devisee, the courts both of law and equity, in conformity to the general rules of construction already stated, do not require in a devise those legal and technical words which, in a deed, are deemed absolutely necessary to the creation of particular estates; but will carry the intention of the testator into effect, if suf-

ficiently declared, however defective the language may be.

Words showing an intention to give the whole interest. 1 P. Wms. 77.

2. It has been long established that the word *heirs* need not be used in a will to create an estate in fee simple, but that any other words which sufficiently show the intention of the testator to give the whole of his interest in the lands devised to the devisee, will have the same effect.

Bro. Ab. Devise, pl 33. 1 Inst. 9 *b.* 1 Rep. 85 *b.*

3. Thus it was resolved so early as in the reign of Edw. III., that a devise to man *in perpetuum* gave him an estate in fee. It is the same where the devise is to a person in fee simple: so of a devise to a man and his successors; the word successors being deemed equivalent to heirs, for *hæres succedit patri.*

§ 557.

4. It is said by Perkins, that if lands be devised to J. S. to hold to him and his assigns, he will take a

1 Inst. 9 *b.*

fee: but Lord Coke says, if a devise be to a man and his assigns, without saying for ever, the devisee has but an estate for life.

Idem.

5. A devise to *A. et sanguini suo*, will pass a fee; for the blood runs through the collateral, as well as the lineal line; but a devise to a man *et semini suo* only gives him an estate tail.

Widlake v. Harding, Hob. 2.

6. Where a person seised of a house and lands leased them for 99 years, and then made his will, by which he devised to B. his house and all his lands for 99 years; and then added these words,—"The said B. to have all my inheritance, if the law will allow." It was held that B. took a fee.

Green v. Armstead, Hob. 65.

7. Where A. seised of lands in W. devised them to his son B. for his life, and then to remain to C. the son of B. except B. purchased another house, with so much land as in W. for C., and then B. should sell the lands in W. as his own. It was held that C. took a fee in the lands in W., as B. did not make any

purchase of any other lands; for the word *purchase* imported, in common parlance, an absolute purchase n fee.

8. The words, "freely to be enjoyed," have been held to pass an estate in fee; as where, after an introductory clause, showing an intention to dispose of his whole estate, a person gave to his sons, T. M. and R. M., all his lands and tenements, freely to be enjoyed and possessed alike; it was held that a fee passed. But in a modern case these words were not allowed to have so extensive an effect. Loveacres v. Bright, Cowp. 352. Oates v. Brydon, 3 Burr. 1895. Goodright v. Barron, 11 East, 220.

9. In another modern case it was held that a devise to the testator's wife of all his property, both personal and real, for ever, passed the fee in the real estate: and that the devisor's intent to use those words in a more restricted sense, was not shown by a subsequent clause of the will, whereby he gave an additional annuity after the decease of his wife to a person to whom he had before given a smaller annuity, preceding the devise to the wife. Doe v. Roper, 11 East, 518.

10. Lord Coke says, a devise to a person, to give and sell, passes an estate in fee; and this doctrine has been confirmed by several determinations. Thus where a person devised to A., to give, sell, and do therewith at his will and pleasure; it was held that the devisee took an estate in fee simple. 1 Inst. 9 *b*. Bro. Ab. Devise, pl. 39.

11. A person devised lands to his wife, to dispose and employ them on her and his son, at her will and pleasure. It was held by Dyer, Weston, and Welshe, that she took an estate in fee. Moore, 57.

12. A person devised in these words,—"I give my houses in Broad-Street to M. T. for her own use, to give away at her death to whom she pleases." Lord Hardwicke held that an estate in fee passed. Timewell v. Perkins, 2 Atk. 102.

Goodtitle v. Otway, 2 Wils. 6.

13. A person devised to Agnes Pearson, who was his heir at law, for and during her life, to be enjoyed by her without molestation, and after her death, to her lawful issue, and if she should have no issue, that she should have power to dispose thereof at her will and pleasure. The Court was of opinion that Agnes took an estate in fee simple, as the contingent remainder to the issue never vested; for the testator, by giving her power to dispose thereof at her will and pleasure, in case she had no issue, had given her a fee simple.

Vide Tomlinson v. Dighton, infra, c. 13.

14. A devise for the benefit of children, during their minority, without any farther disposition, has been held in some cases to give such children an estate in fee.

Newland v. Shephard, 2 P. Wms. 194.

15. A person devised the residue of his real and personal estate to trustees, their heirs, executors, and administrators, in trust to pay and apply the produce and interest thereof for the maintenance and benefit of such of his grandchildren by his only daughter N. as should be living at the time of his decease, until his said grandchildren should attain the age of twenty-one years, or be married; and made no farther disposition of his estate, but only directed that if all his trustees should die, his son in law N., the husband of his daughter, should be a trustee.

Lord Macclesfield said, the intention was most plain, that the grandchildren should have the surplus both of the real and personal estate, after the age of twenty-one, for it could not be imagined that the testator should show a concern for his grandchildren, when they did not want it, and leave off that care at the only time when they could be supposed to stand in need of it, namely, when they came of age, and were marriageable. Besides, it was plain the testator

gave all from the heir at law, by vesting the whole estate in fee, as well the legal property as the personal estate, in trustees; which would not have been done had any thing been intended to remain to the daughter and heir: not only the interest but the produce of the real and personal estate was to be applied by such trustees; and to help this plain intention of the testator, the word *produce* should be taken in the larger sense, and then it would signify whatever the estate would yield, by sale or otherwise; and this case was the stronger, in regard the son in law was to be a trustee, in case the other trustees should all die; but it could not be intended that the son in law should be a trustee for himself, or for what himself would be entitled to, should it come to his wife.

It is reported in Atkyns that Lord Hardwicke said, he could see no reason to approve of this case. It has, however, been admitted as an authority in the following case. 3 Atk. 316.

16. G. P. devised all the rest, residue, and remainder of his real and personal estate to two trustees, in trust for his younger son G., till he attained twenty-one, and then the trust was to cease. Peat v. Powell, Amb. 387.

Lord Henley, after taking time for consideration, delivered his opinion, that G. was intended to have the whole beneficial interest in the residue of the real and personal estate; and that the trust was to continue only during his minority. That it was the same as if the testator had said,—I give the estate to trustees, in trust for G. till he attain 21, and then to G. and his heirs. That Shephard v. Newland was a much stronger case. Doe v. Roper, 11 East, 518. Doe v. Clayton, 8 Ves. 141.

17. A devise to trustees in fee, in trust for A. B., without any words of limitation, has been held to pass the beneficial interest in fee to A. B.

Challenger v. Shephard, 8 Term R. 597.

18. Upon a case sent out of Chancery for the opinion of the Court of K. B. the facts were; a person had devised to trustees and their heirs a certain estate, in trust for Joan the wife of John Pippet and James her son; one moiety of the profits to be applied by the trustees to the separate use of the said Joan, and the other moiety to be laid up, or otherwise improved, till the said James should arrive at his age of 21 years. And his will was, that if the said Joan should die during the minority of the said James, the trustees should lay up the increase and profits of the mother's moiety, for the benefit of her son; and after the decease of the said Joan, should permit and suffer the said James to enter upon and enjoy the whole, as soon as he attained the age of 21 years.

It was insisted that James took only an estate for life, because no words of inheritance were added to the devise to him. That the argument drawn from the cases in Peere Williams and Ambler, that the beneficial interest which the devisee took was co-extensive with the legal interest devised to the trustees, was untenable, because it tended to show that in all cases where an estate was given to trustees and their heirs, in trust, the *cestui que trust* must take a fee. But the estate of the *cestui que trust* was not to be measured by the estate devised to the trustees, and a contrary doctrine had at all times prevailed, namely, that the heir at law takes whatever is not expressly devised away from him.

It was said in reply, that it was not necessary to contend that the heir at law would take whatever

was not devised away from him, because here the fee was expressly given to the trustees; and by that devise the testator had manifested his intention that the heir at law should not take. Then if the estate did not descend to the heir at law, the question was, to whom it was devised. And the two cases cited from Peere Williams and Ambler showed that the law had already put a construction on a will framed like the present, and had said that the *cestui que trust* should take a beneficial interest in the whole that was devised to the trustees.

The Court gave no opinion when the case was argued, but certified that John Pippet took a beneficial interest in fee.

Words of Reference.

19. The quantity of estate intended to be given may be described either by express words, or by reference to another devise; and therefore if a testator devises Blackacre to A. B. and his heirs, and Whiteacre to C. D., to hold in the same manner as A. B. holds Blackacre, C. D. will take an estate in fee simple in Whiteacre. Perk. § 561.

1 Roll. Rep. 369. 3 Bulst. 127.

20. A person made his will in these words: "I devise to my eldest son and his heirs Blackacre for his part. *Item*, I devise to my second son Whiteacre for his part." Adjudged, that the second son took a fee; because the words had a reference to the part of the eldest son.

Effect of an introductory Clause.

21. Where the introductory clause prefixed to a will, shows that the testator intended to depart with his whole property; the subsequent words will, if possible, be construed so as to pass an estate in fee, and to prevent an intestacy as to any part of his property.

Tuffnell v. Page, MSS. R. 2 Atk. 37.

22. A *cestui que trust* in fee of a copyhold estate, made his will in these words." All the estate I have

I intend to settle in this manner, viz. my estate at Kirby Hall I give to my dear brother, and after his decease my desire is that it should be disposed of to Mr. W. Tuffnell."

Lord Hardwicke.—I think the inheritance passes. All cases of this nature depend on the circumstances attending them; and in my opinion the introductory clause of this will is decisive. He mentions his intent to settle his estate, from whence it is plain that he proposed making an absolute disposition of the premises; which could not be, were the devisee to have but an estate for life.

Ibbetson v. Beckwith, Forr. R. 157.

23. A testator began his will in these words: "As touching my worldly estate, wherewith it has pleased God to bless me, I give, devise, and dispose of the same in the following manner." He then gave to his mother all his estate at N. with all his goods and chattels, as they then stood, for her natural life; and to his nephew T. D. after her death, if he would but change his name: if he did not, then he gave him only 20*l.* a year, to be paid him for his life, out of N. Close and the farm held at R., which he gave her, upon his nephew's refusing to change his name, to her and her heirs for ever.

It was decreed by Lord Talbot that the nephew took an estate in fee, for the intent plainly appeared to pass the inheritance.

Frogmorton v. Wright, infra, ch. 13. Doe v. Buckner, 6 Term R. 610.

24. The determination in this case was not founded entirely on the force of the introductory clause, and in some modern cases the courts have refused, in the construction of a will, to connect the introductory clause with that which contained the devise.

The word Estate. Tit. 1. § 11. 1 Inst. 345 *a.*

25. As the word estate signifies such an interest as the tenant has, so that if a man grants all his estate in Dale to A. and his heirs, every thing which he can

grant will pass thereby; it has been long established, by analogy from this principle, that in a will the words, all my estate, pass a fee simple.

26. A person devised to his wife his whole estate, paying debts and legacies. Adjudged, that the wife took a fee by force of the words, my whole estate; for they extended to his land, according to the common parlance, and also to all his estate in the land. Johnson v. Kerman, 1 Roll. Ab. 834.

27. In the case of Bridgewater v. Bolton, it was resolved, that the fee simple of the rents passed, or at least the whole estate of the devisor therein; for all his estate was a description of his fee. ante, c. 10. § 64.

28. A person having copyhold estates which he had surrendered to the use of his will, devised in these words,—"All other my estate, of what nature soever, I give to my wife Joan, whom I make my executrix, to pay my debts and legacies therewith." Resolved, that the inheritance passed. Lane v. Hawkins, 2 Show. 388.

29. A person devised all her land and estate in Upper Catesby, with all their appurtenances, to W. E. It was objected, that only an estate for life passed in these lands; for where a man devises his land and estate in such a place, it describes only the thing, and not the interest in it; and the words in Upper Catesby did nothing but point out the locality of the thing; and lands and estate in this case were synonymous. Barry v. Edgeworth, 2 P. Wms. 523.

Sir J. Jekyll said, the case of Bridgewater v. Bolton seemed to have settled the law in this point, it being a resolution given on great consideration, in which Lord Cowper, when of counsel, discouraged a writ of error in parliament. And Lord Holt, who pronounced the judgment of the court, laid it down as a rule, that a devise of all one's real estate, compre-

hended not only the thing, but also the interest in it. The word estate naturally signified the interest rather than the subject, and its primary signification referred thereto: and though the devise was of all her land and estate in Upper Catesby, this was not restrictive with respect to the *estate* intended to pass by the will; but only as to the land, as if the testatrix had land in another parish; suppose for instance in Lower Catesby, those lands in Lower Catesby could not have passed by the will; and as the word estate has been agreed and settled to convey a fee in a will, it would be dangerous to refine upon it, for then none could give any opinion thereupon; and these words or the like were frequently made use of in wills: besides, the word estate, if it did not pass a fee in the present case, would be quite void, since the devise of the lands did before of itself pass an estate for life; and no word in a will should be rejected, that could have any construction.

Baylis v. Gale, MS. Rep. 2 Ves. 48.

30. A person devised in the following words: "I give unto my wife, for so long as she shall live, all that estate I bought of Mr. Mead, with its appurtenances. *Item*, I give to my son Josiah Gale, part of that estate called Southfield, to him and his heirs for ever. *Item*, I give to my son Isaac Gale, the other part of that estate, to him and his heirs for ever; but if either of them shall die without issue, the survivor shall take the whole. *Item*, I give to my son Charles, all that estate I bought of Mr. Mead, after the death of my wife." The question was, what interest Charles took in Mead's estate.

Lord Hardwicke.—"The first point is, whether an estate for life or in fee passed by the devise of that estate which he bought of Mead; and I am of opinion, that it extends as well to a gift of the thing

itself, as of his whole interest in it. So have been all the latter determinations, upon the reason that men are *inopes consilii* when making their wills, which was the case here; for this will, if not made by the testator himself, was certainly made by some very unskilful person. However his intention appears to dispose of his whole estate among his children. In all the modern cases where the word estate is used, it has been held to pass a fee, unless there be some words used to restrain that generality; for estate is *genus generalissimum*, as held by Lord Ch. J. Holt in the case of Bridgewater v. Bolton. It was objected that there should have been the word *my*, but the want of it makes no difference, for the words, *all the estate I bought of Mead*, are fully sufficient to carry as well the whole interest, as the thing itself. It was next objected, that where the testator gives but a life-estate to his wife, he has used the very same words; but no argument can thence be drawn, that where he has not expressly given an estate for life, he did not mean to give a fee, but it rather turns the other way. He apprehended those words might give a fee, and has therefore restrained them, in his wife's case, to an estate for life, but adds no restraint where he meant to give them their full scope. But what weighs most in all those cases is, that the testator is making a division of his whole substance amongst his children, and as I said before, presumed to be *inops consilii*, and his intent therefore shall be carried into execution. This case is stronger than that of Ibbotson v. Beckwith, whence arises another answer to the objection of his having used the word estate, as well where he makes a devise to his wife for life only, as in that in question; and shall therefore not be presumed to intend different interests,

ante, § 23.

viz. the incorrectness of the will. This was given as an answer by Lord Talbot, and is equally so upon this will, which is also a very incorrect one."

Holdfast v. Martin, 1 Term R. 411. Chichester, v. Chichester, 4 Taunt. 176. Chorlton v. Taylor, 3 Ves. & B. 160.

31. A person being seised in fee of a house and land at Braywick, in the county of Berks, devised the same in the words following:—"I give and bequeath to Mrs. Martin my estate at Braywick, Berks." It was contended that these words did not pass a fee, for want of the word *all*; but the Court held that the devisee took an estate in fee.

Smith v. Coffin, 2 H. Black. 444.

32. The words testamentary estate will also pass a fee simple, where there is an introductory clause indicating an intention to dispose of all the testator's property.

33. Where the word estate is used only for the purpose of describing the local situation of the lands devised, it will not have the effect of passing an estate in fee; as will be shown in a subsequent chapter.

All my real Property.

34. The words "all my real property" will carry fee simple.

Nichols v. Butcher, 18 Ves. 193.

A copyholder devised his estate in these words: "I do will and bequeath all my real and personal property to my wife."

Sir W. Grant said, that in the absence of direct authorities upon the subject, he thought the testator must be considered to have intended to pass his whole interest, as he did not see how a man could be said to give all his property, unless all his interest in it passed. It seemed in many cases that the Judges had explained the meaning of the word estate, by saying that it imported the absolute property.

The words Right, Title, and Interest. Cole v. Rawlinson, 3 Bro. Parl. ca. 7.

35. A devise of all a person's right, title, and interest, will pass a fee. As where a woman, being tenant for life of a house, remainder in tail to her son, with the reversion in fee in herself, devised all

her right, title, and interest in the house to her son. It was resolved, that these words passed the reversion to the son in fee.

36. A person devised all his part, share, and interest of and in the estates of T. C. unto his sister for life; and from and after her decease he gave the same to J. S. Andrew v. Southouse, 5 Term R. 292.

Lord Kenyon held that these words passed an estate in fee; and said there was no doubt but that the word interest would pass a fee.

37. The words, all the rest, and residue of my real and personal estate, will in most cases be deemed sufficient, to pass an estate in fee simple. All the Rest and Residue of my Estate.

A devised 50*l.* to his heir at law, and then gave all the rest and residue of his real and personal estate to his wife. It was decreed, that the wife took an estate in fee simple, in the real estate of the testator. Murray v. Wise, Prec. in Cha. 264. 2 Vern. 690.

38. A will was made thus:—"As to all my temporal estate with which it has pleased God to bless me, I dispose of the same as follows." Then there were several bequests, and then came these words: "And all the rest of my estate, goods, and chattels whatsoever, real and personal, I give to my beloved wife." Adjudged, that the words in this will were the same as if the testator had said, "I devise the rest and residue of my temporal estate;" which therefore passed a fee simple. Tanner v. Wise, 3 P. Wms. 295. Cliffe v. Gibbons, 2 Ld. Raym. 1324.

39. In the case of Shaw v. Bull, Lord Ch. J. Trevor said,—"In the construction of wills generally, the words, my estate, the residue of my estate, or the overplus of my estate, may well pass an inheritance, where the intent is apparent to pass it. But such intent to carry an inheritance by such words must be very apparent, and necessary to be drawn from the words of the will, and circumstances of the case; for if the words be indifferent to real and personal estate, 12 Mod. 596.

or may be applied to personal alone, there the heir at law is not to be disinherited by the implication of such words, or by any implication at all, but what is a necessary one."

Ridart v. Pain. M S. Rep. 1 Ves. 10. 3 Atk. 486.

40. A testator, taking notice of a jointure he had made, of one moiety of an estate, upon his wife, gave her the other moiety for life, for her better support and maintenance; and also gave her a house and a parcel of land for her life; then he gave several other estates to his relations for life, remainder in tail, remainder in fee; and then devised in the following words: "All the rest, residue, and remainder of my goods and chattels, and personal estate, together with my real estate not herein-before devised, bequeathed, or disposed of, I give, devise, and bequeath to my wife."

The testator had an advowson and wharf which were not devised at all; and the question was, whether the fee of the advowson and wharf, and the reversion of the particular estate expressly given to the wife for her life, passed to her, by the residuary clause.

Lord Hardwicke.—"The estates not mentioned in the will clearly pass by the residuary devise, the word estate importing a fee, and therefore the fee of those estates is well devised by the residuary clause. As to the parcels devised to the wife for life, I am also of opinion, that the fee of the reversion passes by the residuary clause; and that the fee of the estates particularly given before by the same will passes by these words, appears from Allen, 28; 2 Vent. 285; and 3 Mod. 228. The only question then is, whether there be any particular circumstances to take this case out of the general rule; and two things have been insisted on, viz. the recital in the devise of the moiety, that the testator intended no more than a provision for life; but plainly that was not his intent,

for he has given his wife his personal estate, not for life, but absolutely; and it is as clear that the real estate not particularly taken notice of, passes likewise to her in fee. It is therefore inferring too much from this recital, that he meant to give her nothing but for life, since he might as well intend to give her the absolute property, for her better maintenance. The second thing insisted on is, that here are particular devises of some estates to the wife, and that the residuary devise being to the same person, it would be inconsistent to make the testator give her the same estate, first for life, then absolutely; the general run of authorities being, where the devisee for life and the residuary devisee are not the same, but different persons. But I think this will not avail: it is too much to say, that where a limited interest is given in one part of the will, and a general one in another, that the devisee must be confined to the particular interest; though I will not say how it would be if absolute negative words were used: as, for life only. The law supposes that a man may vary his intent, even while he is writing his will, which frequently happens. But there is a particular argument furnished from this will, in support of this construction, for here are remainders limited over in fee of other estates given by the will, which shows that where the inheritance was meant to be absolutely disposed of, from the wife, it is done so by the will; and that what the testator intended to give his heirs, is taken by way of exception out of the inheritance."

41. A person began his will thus: "As to all my temporal estate wherewith it hath pleased God to bless me, I give and devise the same as follows." Then he gave several legacies to A. and directed him to sell all or any part of his real and personal estate,

Grayson v. Atkinson, 1 Wils. R. 333.

for the payment of his debts and legacies; and concluded his will with this residuary devise,—"As to all the rest of my goods and chattels, real and personal, moveable and immoveable, as houses, gardens, tenements, my share in the copperas works, &c., I give to the said A.;" without using the word estate, or any words of limitation whatever. Lord Hardwicke doubted at first, but was afterwards clearly of opinion, as the testator had a fee, that A. took a fee.

Fletcher v. Smiton, 2 Term R. 656.

42. A person seised of shares in the corn market of the city of London, devised to his nephew the income of his shares in the corn market, for his natural life; and all the rest of his estates, with all monies in the stocks, &c. to be divided into equal shares to Eliz. Snow and four other persons, share and share alike. It was resolved that the last clause comprehended the reversion of the shares in the corn market, and carried the absolute inheritance in them to Eliz. Snow and the other devisees.

Jackson v. Hogan, ante, c. 10. § 76.

Whatever else I have not disposed of.

43. The words, whatever else I have not disposed of, or any other words of that nature, will pass an estate in fee simple.

Hopewell v. Ackland, 1 Salk. 239. Com. R. 164.

44. Thus where a person devised his manor of B. to A. and his heirs; and then proceeded thus:—"*Item*, I devise all my lands, tenements, and hereditaments to the said A. *Item*, I devise all my goods and chattels, money and debts, and whatever else I have not before disposed of, to the said A., he paying my debts and legacies."

Lord Ch. J. Trevor held, that under the concluding clause, *whatever he had not disposed of*, an estate in fee passed.

The words Remainder and Reversion.

45. If a testator devises the whole remainder of his lands, these words will pass an estate in fee simple.

46. A person devised to his sister, and after her decease, the whole remainder of his lands to his brother, if he survived her. Adjudged, that these words could not extend to the quantity of the land, but to the quantity of estate in the land; for the whole land was given to the sister for life, so there could be no remainder of that; therefore it must be the remainder of the estate in the land, and by consequence a fee simple passed. Norton v. Ladd, Lutw. 761. 1 Ld. Raym. 187.

47. The word reversion is also sufficient in most cases to pass an estate in fee simple.

Thus where a person devised in these words,— "Also I give to my son Charles the reversion of those two tenements now in the possession of J. C.; also I give him the reversion of the tenements my sister T. now lives in, after her decease." Baylis v. Gale, MS. Rep. 2 Ves. 48.

Lord Hardwicke.—"As to the word reversion, I am also of opinion that it passes the whole interest. A reversion is a right of having the estate back again; and I think that according to Norton v. Ladd, where the devise was of a remainder, this is a good devise of the fee, unless there had been words to restrain it. How can the testator be thought to have given but a life estate herein to his child, when possibly the life of the particular tenant might have lasted longer than that of the child, and so the child have taken nothing at all. This proves he meant to give him a fee. ante, § 46. Piton v. Banks, 1 Vern. 65. contra.

48. It is a long established rule in the construction of wills, that if a person devises lands, with a direction that the devisee shall pay a gross sum out of it, the devisee will take an estate in fee, without any other words; though the sum directed to be paid should not amount even to a year's rent of the land. Devise on Condition of paying a Sum of Money. 1 Inst. 9 b. Cowp.R.841.

This construction is founded on the principle that a devise of land shall in all cases be intended for the benefit of the devisee; now if a devisee was in cases of this kind only to take an estate for life, he might die before he received from the land the gross sum he had paid; and consequently be a loser by the devise.

Willock v. Hammond, Cro. Eliz. 204. 3 Rep. 20 *b.*

49. T. W. devised copyhold lands, of the nature of borough english, to his eldest son; paying 40 *s.* to each of his brothers and sisters. Adjudged that he took a fee.

Collier's Case, 6 Rep. 16.

50. A testator devised lands to his brother, paying to one person 20 *s.*, and to others small sums, amounting to 45 *s.* in all. The land was of the value of 3 *l. per annum*. Adjudged that the brother took an estate in fee.

Moore v. Price, 3 Keb. 49.

51. A person devised all his estates, to A. paying 40 *l.* a piece to his sisters. Adjudged a fee simple. And it appearing that the personal estate was not sufficient to satisfy legacies, it must consequently b intended his real estate. Besides, the devisee was not executor, and therefore it could not be intended of the personal estate.

Reeves v. Gower, 11 Mod. 208.

52. A. by his will devised lands to B., and then bequeathed legacies; and gave 5 *l.* to C., and directed B. to pay it, but gave him two years for that purpose. The jury found the land to be worth fifty shillings a year. It was adjudged that B. took a fee; for the devise was of a sum in gross, and *debitum in præsenti solvendum in futuro*. Besides, it was a sum certain, to be paid to B. at all events, whether the land yielded full five pounds or not, and so not like the cases where the sum devised was to arise out of the profits.

53. A devise of lands, charged with the payment of debts and legacies, will, for the same reason, pass an estate in fee simple. Or charged with Debts and Legacies.

54. A person devised to his brother Richard all his lands, tenements, and hereditaments, and whatever else he had in the world, and made him executor, desiring him to pay his debts and legacies. Adjudged on a special verdict that the devisee took an estate in fee. Ackland v. Ackland, 2 Vern. 687.

55. A. seised in fee of lands, made his will and gave his cousin B. 20 *l.*, to be paid out of his lands within one year; and after other legacies, he gave all his lands to Richard, generally. Adjudged, that Richard took an estate in fee. Freak v. Lea, 2 Show. R. 38.

56. A will was made in these words,—"All the rest, residue, and remainder of my messuages, lands, tenements, hereditaments, goods, chattels, and personal estate whatsoever; my legacies and funeral expences being thereout paid; I give, devise, and bequeath unto my sister J. D., and constitute and appoint her my executrix, and residuary legatee, of this my will." Doe v. Richards, 3 Term R. 356.

Lord Kenyon said, that the first words alone were not sufficient in law to carry a fee; but that he relied on the words immediately following, "my legacies and funeral expences being thereout paid," as sufficient for that purpose: for the fund which was to answer those demands, ought to be as ample as possible. Those charges extended to, and were to be taken out of, the property which was before given to the residuary legatee; and if that devise did not comprise the whole of the devisor's estate, the interest as well as the land, the legacies and funeral expences might not be paid. Vide Denn v. Miller, infra, ch. 13.

Doe v. Holmes, 8 Term R. 1.

57. A person devised in these words,—"I give and bequeath my freehold house with the appurtenances, &c. and all furniture thereto belonging, to E. G. whom I make executrix of this my last will; she paying all my just debts and funeral expences, and legacies before mentioned, twelve months after my death. I likewise leave to the said E. G. all the rest and residue of my personal estate."

The judge before whom the cause was tried being of opinion that the devisee took a fee, by reason of the words, "she paying all my debts," nonsuited the plaintiff.

On a motion to set aside that nonsuit, Lord Kenyon said,—"I am clearly of opinion that the direction given at the trial was perfectly right. In cases of this kind the question has always been, whether the charge is to be paid only out of the rents and profits of the estate, or whether it is to be paid by the devisee at all events; in the former case the devisee only takes an estate for life, but in the latter he takes a fee, otherwise he might be a loser by the devise. Here the devisee is bound to pay the debts and legacies, at all events; and the charge is thrown on her in respect of the real estate. The personalty is given to her by the next clause in the will."

Goodtitle v. Maddern, 4 East, 496.

58. A person devised in these words,—"All the rest I have in the world, both houses, lands, goods and chattels, stock in trade, and all other things that belong or may belong to me, I give to my present wife J. P., my executrix; so that she shall sell my stock in trade and household goods, and if these will not pay the debts, she shall sell next the house of fee in Penzance, and not Prospednick; so that my executrix shall pay in good time all lawful debts."

Lord Ellenborough said it was clear that the executrix and residuary legatee took a fee in the premises in question; for she was charged with payment of all the debts, and she had the land devised to her, as well as the personal estate, all in the same clause, in order to enable her to satisfy that charge; and she could not have less than a fee in it, because she was empowered to sell it, which she could not do without having the fee: as to what was said in the will relative to the sale of the stock in trade, and household goods, in the first instance, for payment of debts, and if those were not sufficient, then the house in Penzance, that was merely directory to her, to apply the personalty first for payment of debts, before the realty, which was no more than what the law directs in the common case. The distinction turned in all the cases on this, whether the debts, &c. were merely a charge on the estate devised, or a charge on the devisee himself, in respect of such estate in his hands.

Goodtitle, v. Maddern, 4 East. 496. Doe v. Snelling, 5 East, 87.

Judgment, that the devisee took an estate in fee.

59. The cases where the payment of debts and legacies is charged on the estate devised, and not on the devisee, will be stated in the 13th chapter.

60. Where lands are devised, with a direction that the devisee shall make a perpetual payment thereout, the devisee will take an estate in fee; for otherwise he could not fulfil the intention of the testator.

Or with annual Payment for ever.

61. A devised lands to C. a younger son, and willed that C. should pay annually to his eldest son B. and his heirs, 3 *l.* Resolved that this was an estate in fee.

Shailard v. Baker, Cro. Eliz. 744.

62. Lands were devised to I. and S. and they were to pay yearly to the merchant taylors of London, 6 *l.* 10 *s.* It was resolved that the devisees took a

Webb v. Herring, Cro. Ja. 415.

fee simple, by reason of the annual payment, without any regard to the greatness or smallness of the sum: as the charge continued for ever, the estate must continue so too, for without the estate the charge could not be.

Smith v. Tindal, 2 Salk. 685. 11 Mod. 102.

63. A person devised four coats to four boys of the parish of D. for ever, and all his lands, tenements, and hereditaments, and all his personal estate to his wife, and her assigns. Adjudged, that the wife had a fee simple, because she took the lands with a perpetual charge.

Or for the Life of a third person.

64. A devise upon condition of paying an annual sum to a third person, during the life of such third person, will give the devisee an estate in fee simple; for otherwise the annuity might cease, before the death of the person to whom it was given.

Lee v. Stephens, 2 Show. 49.

65. A person devised lands to A. B. conditionally that he should allow to his son Nicholas, meat, drink, &c. during his natural life. It was argued that this was a fee simple; for Nicholas had no manner of provision else: it was plain the testator designed the maintenance to be for Nicholas's life; and not that when A. B. should die, Nicholas should starve: therefore it was clear that A. B. must have a larger estate than for his own life, for otherwise, instead of having a benefit by the will, he would be prejudiced by it, if he should perform the testator's will.

Adjudged that A. B. took an estate in fee simple.

Reed v. Hatton, 2 Mod. 25.

66. A person devised two houses to his son Robert, upon condition that he should pay unto his two sisters 5 *l.* a year, with a clause of entry for non-payment.

The Court was of opinion that a legacy or devise was always for the benefit of the party; so that it was reasonable to make such construction of the will, that he might have no possibility of a loss:

for if there was a devise to one, upon condition that he paid a sum of money; if there was a possibility of a loss, though not very probable, it should be construed a fee; and therefore the estate in this case being limited to Robert, and charged with payments to the sisters, during their lives, plainly proved the intent of the testator, that the devisee should have an estate in fee simple. Judgment was given accordingly.

67. T. Ives devised a house to Clement Boreham for his life, paying thereout 40*s.* a year to Robert Boreham the testator's grandson; and gave two copyhold tenements to Sarah Boreham, she paying *thereout* 40 *s.* a year to her sister Elizabeth. Baddeley v. Leppingwell, 2 Burr. 1531. Wilmot, 223.

The question was, what estate Sarah Boreham took. It was admitted that if this was an annuity for life to Elizabeth, it would make it a devise in fee to Sarah; and as this could not be effectuated without construing the inheritance to be given to Sarah, it raised a violent presumption that the testator intended her an estate of inheritance.

The Court was of opinion that Sarah took an estate in fee.

68. A person having a copyhold estate, after giving several legacies, gave to Mary Ramsey 20 *s.* a year for her life, to be paid by his executors. He also gave to his kinsman T. Allin all his two yard-lands, with his house and homestead; and all the residue and remainder of his goods, chattels, debts, mortgages, leases and personal estate, he gave to the said T. Allin, he paying his debts, legacies, and funeral expences; and made the said Allin executor. The question was, whether the devise to T. Allin was for life or in fee. Goodright v. Allin, 2 Black R. 1041.

Lord Ch. J. De Grey said he thought the real estate devised to Allin was in fee simple; and that upon two grounds: 1st. By implication; not indeed a necessary implication, strictly speaking, but so far necessary as it clearly arose from the reasonable construction of the will. The annuity was given to Mary Ramsey for her natural life, to be paid by his executor; which being of an uncertain duration, must have an estate in fee to support it. 2dly. All the several devises to Allin followed each other immediately, and must therefore be construed as one clause; so that the payment of debts and legacies was charged on the real, as well as the personal estate. The other judges concurred.

Goodright v. Stocker, 5 Term R. 13.

69. A testator began thus—"As touching all such temporal estate, &c." and then devised a house to his grandson, paying yearly and every year out of the said dwelling-house, the sum of 15 *s.* to his granddaughter.

Lord Kenyon.—"Though the general introductory words used in this will would have some effect in the construction of the subsequent devises, as was said by Lord Talbot in a case before him; they would not of themselves carry a fee. But it has been very properly admitted, that the words, paying yearly and every year, are sufficient for that purpose. That annuity was intended to continue during the granddaughter's life, though it is not so expressly mentioned; and therefore of necessity the grandson must take an estate in fee." Judgment was given accordingly.

Ibbetson v. Beckwith, ante, § 23.

Andrew v. Southouse, 5 Term R. 292.

70. The following case was sent out of Chancery for the opinion of the Court of King's Bench. A person devised certain estates to her sister for life, and after her decease, she gave the same to E. South-

ouse, charged with the payment of an annuity of 20*l.* to J. T. for and during the term of his natural life.

The Court certified that E. Southouse took an estate in fee. And Lord Kenyon observed, that the determination in Ansley v. Chapman, was founded on more limited grounds than those adopted in modern times. infra, c. 13.

71. Where lands are devised, with a direction that the devisee shall pay an annual sum out of the rents and profits of the lands, the devisee will only take an estate for life. The cases on this point will be stated in the thirteenth chapter.

72. It has been resolved in some modern cases, that a devise generally, with a limitation over, if the devisee dies under age, and without issue, will give an estate in fee. A Devise with a Limitation over.

73. A person made her will, beginning as follows: "As to my worldly affairs and estates, &c. I do dispose thereof in manner following." She then gave to her son J. H. a certain house; and if the said J. H. should happen to die in his minority, or before he came to age, then she gave the said house to her three daughters. Frogmorton v. Holyday, 3 Burr. 1618.

Lord Mansfield said, the devise over, if the son should die under twenty-one, to the three daughters, showed the intention of the testatrix to give a fee; for if he lived to twenty-one he might then dispose of it himself; if he died before, he could not, and then she disposed of it. If the son was barely to take an estate for life, the time of his death must be immaterial to the devise over; but limiting it over only upon the contingency of his dying in his minority, showed that she intended to give him an absolute estate in fee, which he might dispose of, if he came

of age; and unless he lived to be of age, when he might dispose of it, she meant it should go to her daughters.

Doe v. Cundall, 9 East, 400.

74. A person devised to the two children of his brother, when they attained the age of twenty-one years; but if either of them should die under the said age of twenty-one years, then the survivor should be heir to the other.

It was resolved, on the authority of the preceding case, that the devisees took estates in fee.

Toovey v. Bassett, 10 East, 460.

75. Upon a case sent from the Rolls for the opinion of the Court of King's Bench, the facts were:—a person devised to certain of her grandchildren, as tenants in common; but in case of the death of either of them, under age, and without leaving any issue, the share of the person so dying to go to the survivor. It was certified that the grandchildren took a fee.

Devise to Trustees for purposes requiring a Fee. Fitzg. R. 10.

76. Where lands are devised to trustees, for the purpose of performing any trusts which require a fee, an estate in fee will pass to them, without any words of limitation: for there is no difference between a devise to a man in fee, and a devise to a man upon trusts which require an estate in fee.

Gibson v. Monfort, 1 Ves. 485.

77. A person gave all and singular his freehold, leasehold, copyhold, and also his personal estate, of what kind soever, to trustees and their executors, administrators, and assigns, in trust to and for several uses, to pay several annuities, sums, and legacies, by and out of the produce of the personal estate; if that should happen to be deficient, then to pay the same by and out of the rents, issues, and profits arising by the real estate.

One of the questions in this case was, whether the trustees took an estate in fee under the devise.

Lord Hardwicke was of opinion, that the inheritance passed to the trustees, and said it had often been determined, that in a devise to trustees, it was not necessary the word *heirs* should be inserted, to carry the fee at law; for if the purposes of the trust could not be satisfied without having a fee, courts of law would so construe it; as in Shaw v. Weigh, and several other cases. Here were purposes to be answered which by possibility, and that was sufficient, could not be answered without the trustees having a fee, viz. the paying of several annuities and large pecuniary legacies, if the personal estate was deficient, which would probably be the case; then how was the rest to be raised, barely by the rents and profits; it must be so, if it was a chattel interest, for then it could not be taken out of the estate by anticipation; but that could not be in this case, for if the pecuniary legacies were not paid out of the personal, the real must be sold to satisfy them; for several of them were to be paid within a year after the testator's death, and could not therefore be paid by annual perception. This then was a purpose which it was impossible to serve, unless the trustees had the inheritance; for if they were to sell a fee, they must have a fee. Fitzg. R. 7.

78. G. B. devised several sums of 3*l.* a year, some for life, and some in fee; and added, that these legacies were to be faithfully paid by his trustee J. C. every year. He also left to his trustee and executor 5*l.* to build a tomb for him, he and his heirs always to see that it was kept in order, and appointed the said J. C. his sole executor and trustee. The Court was of opinion, that all the estate of the testator passed to the trustee in fee; because the intention was clear, that he meant to devise his real estate in Oates v. Cook, 3 Burr. 1684.

trust; and there were trusts to be executed, which the trustee could not effectuate, without having an estate in fee devised to him; for there were annuities in fee charged on the real estate, and the estate must be co-extensive with the charges.

Tit. 16. c. 8. § 10. Fearne Rem. 6th edit. 357.

79. In commenting on the case of Vick v. Edwards, Mr. Fearne observes, that the first words alone would, from the nature of the trust, have carried the fee to the trustees. The latter words did not give it from them; which indeed would have been an express negative upon the constructive operation of the first. But their effect was included in that of a devise to the trustees and their heirs, inasmuch as they expressly direct the fee to the same person as such a complete limitation would ultimately carry it to, viz. the survivor of the trustees.

What words pass the whole Interest in a Chattel.

80. In the case of chattels real, that is, long terms for years, a general devise of them will pass all the estate and interest of the devisor, without any words of limitation.

Fenton v. Foster, Dyer, 307.

81. The termor of a messuage for forty years, devised the messuage by his will, without any words of limitation. It was resolved that the entire term passed, for the devisee could not have any estate in the house, at will, or for term of life, or for the term of any years, or a year, therefore the whole term passed.

Tit. 8. c. 2. § 26.

82. A disposition of a term for years to a person and the heirs of his body, is a disposal of the entire interest in the term; for a term cannot be entailed. But a devise over of a term, after a prior disposition of it to a person for life, is good by way of executory devise; of which an account will be given in a subsequent chapter.

83. It is said by Lord Parker, that a devise of a term to one for a day, or an hour, is a devise of the whole term, if the limitation over is void, and it appear at the same time that the whole is intended to be disposed of from the executors. But if such an intention does not appear; then it has been held that a limitation of a term to one for life, does not vest the whole so absolutely in him, as to be at his disposal; but leaves a possibility, viz. upon the death of the devisee within the term, of reverter in the executors of the testator.

1 P. Wms. 666.

Fearne's Ex. Dev. 278.

84. A. being possessed of a term for 99 years, devised it to B. for life, remainder to C. for life, and so on to five others, successively for life. It was resolved, that after the death of the seven persons to whom the term was devised for life, it should revert to the executors of the testator.

Eyres v. Faulkland, 1 Salk. 278.

TITLE XXXVIII.

DEVISE.

CHAP. XII.

Construction—What words create an Estate Tail.

1. *No Technical Words necessary.*
7. *The word Heirs qualified by subsequent words.*
26. *Or by a Remainder over to a collateral Heir.*
27. *The words Issue, Children, &c.*
32. *An Estate Tail may arise by Implication.*
37. *A Devise generally may be enlarged into an Estate Tail.*
46. *A Devise for Life may be enlarged into an Estate Tail.*

SECTION 1.

No Technical Words necessary.

1 Inst. 9 *b.* 1 Vent. 228.

AS lands may be devised in fee, without any of those technical words which are required in deeds; so may they be devised in tail. And therefore a devise to a person, *et semini suo*, or to a man and his wife, *et hæredi de corpore, et uni hæredi tantum*, gives an estate tail.

Cro. Eliz. 314.

2. It was agreed by the Judges of the Court of K. B. in 36 Eliz., that a devise to one and the heir of his body, was an estate tail, and should go to all the heirs of his body; for heir was *nomen collectivum*, and one can have but one heir at one time; and this should go from heir to heir.

Tit. 32. c. 21. § 21.

3. It has been stated that a limitation in a deed to a person and his heirs male, creates an estate in fee. But in a will those words will create an estate tail.

4. A person devised to his eldest son, all that his farm called D., to him and his heirs males for ever. Resolved, that the eldest son took an estate in tail male; for the law would supply the words *of his body*. Baker v. Wall, 1 Ld. Raym. 185.

5. Where an estate is expressly devised to a person and the heirs of his body, no charge on such estate will enlarge it to an estate in fee.

6. A person devised a messuage and lands to her eldest daughter Alice, and the heirs of her body lawfully to be begotten, for ever; remainder to her other daughters in the same manner, charged and chargeable with the full sum of ninescore pounds, to be levied and raised out of the first clear annual profits of the said messuages, &c. And that her executors should stand possessed of the said messuage for so long a time as until they should raise the said sum; and to and for the benefit of her daughters A. M. and I. (to whom she had given the money) until the same should be paid by her eldest daughter Alice or her heirs; and from and after the raising thereof by Alice or her heirs, it was her will that she and her heirs should enjoy the said messuages, &c. for ever. Doe v. Fyldes, Cowp. 833.

It was resolved, that as the words of the devise created an estate tail; the charge on the lands, and the subsequent use of the words, "heirs of Alice," should be construed to refer to the special designation of heirs to whom the estate was devised at the beginning of the will; and therefore that Alice took only an estate tail. And Lord Mansfield observed, that there never was an instance of an estate in fee raised by implication from the circumstance of a charge being made by the devisor, where an express estate for life, or in tail, was given; and here it was an estate tail, with several remainders over. Denn v. Shenton, infra, Denn v. Slater, infra.

The word Heirs qualified by subsequent words.

7. Although a devise to a man and his heirs gives him an estate in fee simple; yet if the word "heirs" is qualified by any subsequent words, which show the intention of the testator to restrain them to the heirs of the body of the devisee, the devise will in that case only create an estate tail.

Church v. Wyatt, Moo. 637.

Nanfan v. Leigh, 7 Taunt. 85.

8. There is a case in Moore, in which it was held that a devise to an unborn person *et hæredibus suis legitimè procreatis*, created an estate tail. And in a modern case sent out of Chancery, where there was a devise to a person and his heirs, lawfully begotten, for ever, the Court of C. P. certified that the devisee took an estate tail; though it was urged that the words *lawfully begotten* were surplusage, and equally applicable to collateral as to lineal heirs. It is however observable, that the testator had in another part of his will devised to a person and to his heirs for ever; so that the variation of the phrase imported a variation of intent, which may have been the ground of the certificate.

Browne v. Jerves, Cro. Ja. 290.

Doe v. Ellis, 9 East, 382.

9. W. B. devised all his lands to John his son, and his heirs; and if he died without issue, he devised his lands in R. to M. his nephew in fee; and his lands in H. to H. his nephew in fee.

It was resolved, that the first limitation to John was the same as if it had been to him and the heirs of his body, and no fee.

Dutton v. Engram, Cro. Ja. 427.

10. W. G. devised lands to his wife for life, and after her death, to John his eldest son, and to his heirs; upon condition that he, as soon as the land should come to him in possession, should grant to Stephen his second son, and his heirs, an annual rent of 4*l.* out of the said tenements; and that if the said John died without heirs of his body, the land should remain to the said Stephen and the heirs of his body.

The first question was, whether John had an estate in fee by the devise; which being to him and his heirs, upon condition that he should grant a rent to Stephen and his heirs, it was said the intent was shown that he should have a fee, for otherwise he could not legally grant such a rent, to have continuance after his death.

It was however resolved to be an estate tail; for being limited, that if he died without issue, then it should be to Stephen and the heirs of his body; that shewed what heirs of John were intended, viz. heirs of his body. But yet, by the limitation of the will, he was to make a grant of the rent, which being by appointment of the donor, it was not *contra formam donationis*, but stood with the gift, and should bind the issue in tail.

11. W. Hydes having two sons, Thomas and Francis, devised all his lands to his wife for life, and after her decease, then he devised his lands in B. to Thomas his son and his heirs for ever, and his lands in E. L. to Francis his son and his heirs for ever; adding the following words, "*Item*, I will that the survivor of them shall be heir to the other, if either of them die without issue." Chaddock v. Cowley, Cro. Ja. 695.

It was resolved, that this was an estate tail; and that although the first part of the will gave a fee, the second part corrected it, and made it but an estate tail.

12. A person gave and devised all his freehold messuage, &c. to his son P. B. and his heirs for ever, on condition that he should pay his son W. B. 30*l.*; and devised estates to his other sons in the same manner. Then followed this clause: "*Item*, my will and mind is, that in case any of my said children unto whom I have bequeathed any of my real estates, Brice v. Smith, Willes R. 1. Com. R. 538.

shall die without issue, then I give the estate of him or them so dying, unto his or their right heirs for ever."

Lord Ch. J. Willes delivered the opinion of the Court, and said the question was, whether P. B. the devisee took an estate in fee or in tail; and this was divided into two questions. 1st. Whether he would have had an estate tail in case the remainder had been devised over to a stranger? 2d. Whether devising it over to the right heirs of the person so dying without issue, made any difference.

As for the first question, it could not be doubted, after so many solemn determinations, that if a man devised an estate to A. and his heirs, and afterwards in his will gave his estate to another, in case A. died without issue, the subsequent words reduced A.'s estate only to an estate tail; and restrained the general word *heirs* to signify only heirs of the body; and this was founded upon these known rules, that the intention of the testator shall always take place in the construction of wills, so far as it can be collected from the will itself, if it be not contrary to the rules of law; and that the priority or posteriority of words in a will was not at all regarded, but that the whole will must be taken together, to find out the intent of the testator.

2°. But this distinction was relied on, that though it would have this construction in case the remainder had been devised over to a stranger, it would be otherwise in the present case, because the remainder was devised over to the heirs of the person so dying without issue. This distinction, though it seemed at first to be of some weight, when considered made no difference, either in reason or in law. Even in grants, where words were construed much stricter

than in cases of wills, if there were words that created an estate tail, the grantee would have an estate tail, though the next remainder was limited to his right heirs; and nothing was more common in settlements than to limit an estate to a man and the heirs of his body, remainder to his right heirs; and for this plain reason, to prevent his disinheriting his issue, except by some solemn act done in his lifetime.

The court was unanimously of opinion, that the devisee took an estate tail.

13. It is observed by Mr. Durnford, in a note to this case, that by the words, *die without issue*, the devisor must have meant dying without heirs of the body, or without heirs generally. But to suppose that he used those words in the latter sense, would be to suppose that he intended to devise the lands to his son P. B. and his heirs for ever, and if he die without such heirs, then to the same heirs. There seemed therefore less doubt in such a case respecting the devisor's intention, than in the ordinary case of a limitation over to a stranger, after a dying without issue by the first taker.

14. J. Leslie devised lands to the use of his eldest son John, and his heirs for ever; and failing issue of his said son John, then to the use of his second son James, and his heirs for ever; and failing issue of that son, then to the use of his third son George, and his heirs for ever; and failing issue of that son, then to the use of every other son that he should have, and their heirs for ever; and failing his issue male, then to the use of his issue female and their heirs for ever. It was determined by the House of Lords, on an appeal from the Court of Exchequer in Ireland, that according to the intention of the testator, his sons

Fitzgerald v. Leslie, 3 Bro. Parl. Ca. 154.

Preston v. Funnell, Willes R. 164.

took successively estates in tail male; and that upon the death of the eldest son, leaving only a daughter, the second son took in the order of succession.

Denn v. Shenton, Cowp. 410.

15. A will was as follows: "I give to my grandson Samuel all my meadow, &c., to hold unto the said Samuel and the heirs of his body lawfully begotten, and their heirs for ever; chargeable with the payment of 8*l.* a year to my niece, &c. But in case the said Samuel shall die without leaving issue of his body, then I give the said meadow, &c. unto my nephew W. G." The question was, whether Samuel took an estate in fee, or an estate tail. It was contended that the testator meant the issue of Samuel should take an estate in fee; and that the devise over was in the event of Samuel's dying without issue at the time of his death, by which means it would be an executory devise.

Doe v. Wetton, infra, c. 17.

Lord Mansfield said, the question was, whether the grandson took an estate tail, or an estate in fee. That the devise was to Samuel and the heirs of his body, and their heirs for ever; but the words, their heirs for ever, were qualified by the subsequent words, in case he shall die without leaving issue, which clearly showed it to be an estate tail; and then the testator gave it over to the lessor of the plaintiff. It was too clear to admit of a doubt. Judgment that Samuel took an estate tail.

Roe v. Avis, 4 Term R. 605.

16. I. Beech devised to his wife for life, and after her decease, to be equally divided between his four children, H. I. E. and S., and to each of them and their heirs for ever, share and share alike; and in case they should be minded and agree among themselves to sell the said estate, then every one of his said children should have their equal shares of monies, from thence arising; but if they consented and agreed to keep

the estate whole together, then and in such case all the rents, issues, and profits thereof, from time to time, as they should become due and payable, should be equally paid and divided between his four children, and to the several and respective heirs of them, on their bodies lawfully begotten, share and share alike.

The Court said, that the children of I. Beech took only estates tail in the respective fourths: for though it was given to them and their heirs, and they had also a power of selling the estate, by the former part of the devise; yet the subsequent words, "to the several and respective heirs of them on their bodies lawfully begotten," restrained the operation of the former words, and reduced the estate devised to an estate tail.

17. W. F. by will, after confirming his settlement, by which one part of the estate was limited to his wife for life, devised the rest of the premises to his daughter and only child Mary, on her attaining 21, and to her heirs: and as to that part which was settled on his wife, he devised the same to his said daughter, after the death of his widow. In case the widow should die before the daughter attained 21; then he willed that both parts of the estate should go immediately to his daughter, and her heirs for ever; but he willed that his wife should hold and enjoy both parts until his daughter should attain the age of 21; and in case his daughter should die without issue, then he empowered her to dispose of the whole by will, or any other instrument in writing; and for want of such issue and direction, &c. then that the same should descend and go to his own right heirs.

Doe v. Rivers, 7 TermR. 276.

The Court was of opinion, that the daughter took only an estate tail.

Doe v. Whichels, 8 Term R. 211.

18. A person devised to her son Richard, and her daughter Elizabeth, and their heirs for ever. Provided that if her said son and daughter should both have issue, then both their dividends aforesaid were to go to the issue of their own bodies: but if but one of them should have issue, then the premises should go to that issue, whether it were the child of her son or daughter aforesaid: but if they both died without issue of their bodies, then immediately to the right heir at law, and his heirs for ever.

Pierson v. Vickers, 5 East, 548.

The Court resolved that the devisees took an estate tail.

19. There are several cases in which words introducing remainders over, after a limitation to heirs, do not abridge or qualify the extent of the word heirs; of which an account has been given in a former title.

Tit. 16. c. 1. § 54.

Or by a Remainder over to a collateral Heir.

20. In consequence of the principle that there can be no remainder limited after an estate in fee simple; where there is a devise to a person and his heirs, and if he dies without heirs, remainder to a stranger, the remainder is void, and the devisee takes an estate in fee simple. But where lands are devised to a person and his heirs, with a remainder over to a collateral heir of the first devisee, the word heirs will be construed to mean heirs of the body; and the first devisee will take only an estate tail; because the limitation over to the collateral heir, plainly denotes that the testator only meant to give the lands to the lineal descendants of the first devisee; for the first devisee could not die without heirs, as long as the collateral heir, or any of his lineal descendants, were existing.

Att. Gen. v. Gill, 2 P. Wms. 369.

Fearne's Ex. Dev. 179.

Webb v. Hearing, Cro. Ja. 415.

21. Thus where a person devised his houses in London to Francis his son, after the death of his

wife; and if his three daughters or either of them should overlive their mother, and Francis their brother and his heirs, then they to enjoy the same houses for term of their lives. The principal question was, whether Francis the son had a fee, or a fee tail, by the will, in regard the limitation was, if his sisters survived him and his heirs.

The Court resolved he had but a fee tail; for heirs in this place was intended heirs of his body; because the limitation being to his sisters, it was necessarily to be intended that it was, if he should die without issue of his body, for they were his heirs collateral; and therefore there was a difference where a devise was to one and his heirs, and if he died without heirs, that it should remain over, it was void, as 19 Hen. VIII. pl. 9; yet when a devise was to one and his heirs, and if he died without heir, it should be to his next brother, there was an apparent intention what heirs he intended; and the intention being collected from the will, the law would adjudge accordingly.

22. A testator devised lands to his wife for life, remainder to Henry his son for life, remainder to his son George and his heirs for ever, and if he died without heirs, then to his two daughters. The question was, whether George took a fee simple, or only an estate tail. And the case of Webb v. Hearing was cited, to prove that where a devise is to one and his heirs, remainder over to another, who is, or may be the devisee's heir at law, such limitation shall be good; and the first limitation construed an entail, and not a fee, in order to let in the remainder-man; but where the second limitation is to a stranger, it is merely void, and the first limitation is a fee simple.

Tyte v. Willis, Forr. R. 1.

Lord Talbot said, George took an estate tail. The difference which had been taken was right; and

the reason of it was, that in the latter case there was no intent appearing to make these words carry any other sense than what they imported at law; but in the former it was impossible that the devisee should die without an heir, while the remainder-man or his issue continued; and therefore the generality of the word heirs should be restrained to heirs of the body; since the testator could not but know that the devisee could not die without an heir, while the remainder-man or any of his issue continued.

Goodright v. Goodridge, Willes R. 369.

Fearne's Ex. Dev. 180.

23. The rule is the same where the remainder is limited to the heirs of the testator himself, if such heirs must also be heirs to the first devisee.

Nottingham v. Jennings, Com. R. 81. 1 P. Wms. 23.

24. A person having issue three sons, John, Francis, and William, devised his lands to Francis and his heirs; and for default of the heirs of Francis, to the heirs of the devisor.

Lord Holt said, that although the devise to the heirs of the devisor, passed no estate to the eldest son, who took the reversion by descent, and not the remainder by purchase, yet it was sufficient to show the intent of the devisor, that the words of the devise, "to Francis and his heirs, and for want of such heirs," meant heirs of his body. And as the devisor said that his own right heir should take after the death of Francis without heirs, although the devisor's heir took nothing by this devise, for he took by descent, yet it appeared that the testator intended, that when Francis was dead without issue, the eldest son should take; and the word heirs could not have any other construction but issue, because he could not die without an heir as long as the testator had an heir.

ante, c. 8. § 20.

Morgan v. Griffiths, Cowp. 234.

25. T. G. devised an estate to his grandson, for and during his natural life; and after his decease, to his right and lawful heirs and assigns for ever; and

for want of such lawful heirs, he gave the same to another grandson, his heirs and assigns for ever.

The Court of K. B. certified to the Court of Chancery that the grandson took an estate tail. Lewis v. Waters, 6 East, 336.

26. But where a devise was to a person and his heirs, and if he died without heirs, remainder to his half-brother; the devise was held by Lord Hardwicke to pass a fee; this being in fact a devise over to a stranger, as the law considers him; because he could not inherit from his brother. Tilburgh v. Barbutt, 1 Ves. 89.

27. If lands are devised to A. and his issue, or to A. and his children, A. having no children at the time, he will take an estate tail; because it is clearly the intention of the testator not to give A. an estate for life only, but that his children should be benefited by the devise; and they cannot take as immediate devisees, not being *in rerum natura*, nor can they take by way of remainder, the devise being immediate. The words, Issue, Children, &c. Wild's Case, 6 Rep. 16. 1 Vent. 229. Frank v. Stovin, 3 East, 548.

28. A person devised to his son William for term of his life, and after his decease, to the men children of his body. And if the said William died without any man child of his body, then that the land should remain to another. Anon. And. 43. Sweetapple v. Bindon, Tit. 5. c. 2. § 14.

The Court resolved that William took an estate to him and the heirs male of his body.

29. E. Wharton devised all the rest and residue of his estate, as well real as personal, to his nephew A. Wharton and his sons in tail male, and for want of such issue in tail male, to his brother J. Wharton and his sons in tail male, and on failure of such issue, to his own right heirs. Neither A. nor J. Wharton had any issue at the time of making the said will, or at the death of the testator. A. Wharton died without issue. Wharton v. Gresham, 2 Black. R. 1083. 3 Term R. 373.

This case was sent from the Court of Chancery, for the opinion of the Court of C. B. and the certificate was, that J. Wharton took an estate in tail male in the premises.

Davis v. Stephens, Doug. 321.

30. C. Stephens being seised in fee of the lands in question, devised the same in the following manner:—"I also give and devise to my son William Stephens, when he shall accomplish the full age of 21 years, the fee simple and inheritance of Lower Shelton, to him and his child or children for ever. But if my son W. S. should happen to die before he should accomplish the full age of 21; then I give and bequeath the fee simple and inheritance of Lower Shelton to my wife for ever."

Lord Mansfield said, if the testator had used the words, all his estate, inheritance, or, for ever; and had stopped there, the fee simple would have passed; but the words child or children were to the full as restrictive as if he had said, and if my son die without heirs of his body. The words of the will give the son an estate tail, for there were no children born at the time, to take an immediate estate by purchase: the meaning was the same as if the expression had been to William and his heirs, that is to say, his children, or his issue. The words, for ever, made no difference, for William's issue might last for ever.

Wood v. Baron, 1 East, 259.

31. The Master of the Rolls directed the following case to be made for the opinion of the Court of K. B.—T. Lowe devised to his daughter Anne, all his estate and effects real and personal, and added these words,—"who shall hold and enjoy the same as a place of inheritance, to her and her children, or her issue for ever. And if it should so happen that my daughter Anne should die leaving no child orchil-

dren, or if it so happen that my daughter Anne's children should die without issue,"—then he directed his estates to be sold.

The Court certified that Anne took an estate tail.

An Estate Tail may arise by Implication.

32. An estate tail may be created by a will by mere implication, without any express words of devise. As where S. A. had issue three sons, B. C. and D.; B. died leaving his wife *ensient*; A. devised to the child his wife's son then went with, 20 *l.* yearly, and if his son C. died before he had any issue of his body, so that his land descended to D. before he came to 21 years, then his executors should occupy it till D. was 21 years of age. It was held that C. took an estate tail by implication, as well by the words, "if he die before he has issue," as if it had been, "if he die without issue."

Newton v. Bernardine, Moo. 127.

Walter v. Drew, Com. R. 372.

33. R. W. having two sons, Richard the elder, and William the younger, devised in these words:— "It is my will, that if Richard my son shall happen to die, and leave no issue of his body lawfully begotten, that then and in that case, and not otherwise, after the death of the said Richard my son, I give and bequeath all my lands of inheritance in L. unto the said William my son, to have and to hold the same, after the death of the said Richard, to him and his heirs."—Adjudged by Baron Price, that Richard took an estate tail by implication.

Goodright v. Goodridge, 7 Mod. 453. Willes R. 369.

34. I. G. having two sons, Richard and John, devised all his lands to his wife for life, and then proceeded in these words,—"and my will is, that if my son Richard do happen to die without heirs, then my son John shall enjoy my lands." Resolved, that Richard took an estate tail by implication.

Gardiner v. Sheldon, 1 Ab. Eq. 197.

35. A person having issue a son, B., who was his heir apparent, and two daughters, devised in these words: "If it happen my son B. and my two daughters to die without issue of their bodies lawfully begotten, then all my lands shall be and remain to my nephew D. and his heirs for ever."

It was held, 1°. That no express estate was by this will given to his children. 2°. Nor any estate by implication; because then it must either be a joint estate for life, with several inheritances in tail, or several estates tail in succession one after another. The last it could not be, because it was uncertain which should take first, which next; and the first it should not be, because the heir at law is not to be disinherited without a necessary implication, which in this case there was not; for it was only a designation or appointment of the time when the land should come to the nephew.

Turke v. Trencham, Dyer, 171 *a*.

1 Vent. 230.

36. It was resolved in 1 & 2 Eliz. that a devise to A. and the heirs male of his body, and if he chance to die without heirs of his body, remainder over, only created an estate in tail male; because an implication shall not control an express limitation.

A Devise generally may be enlarged into an Estate Tail.

37. A devise to a person generally, without any words of limitation, which of itself would create only an estate for life, may be enlarged, by subsequent words, or by implication, into an estate tail.

Chapman's Case, Dyer, 333.

38. A house was devised to three brothers, among them; provided always, that the house were not sold, but should go to the next of the name and blood. It was adjudged that the devisees took estates tail.

Sonday's Case, 9 Rep. 127.

39. M. Sonday devised a house to Margaret his wife for life, and after her decease, his son William

to have it; and if his son William married, and had by his wife any male issue, lawfully begotten of his body, then his son to have it; if he had no male issue lawfully begotten of his body, then his son Samuel to have the house. And added a clause, that if any of his sons or their heirs male, issue of their bodies, went about to alien or mortgage the house, then the next heir to enter.

It was resolved that an estate in tail male was created, for three reasons. 1°. Because the testator says, "if he hath no issue male, his next son to have it," which was as much as to say, "if William dies without issue male," which words were sufficient to create an estate tail in him. 2°. The last clause, "if any of his sons or their heirs male, issue of their bodies, go about, &c." 3°. The thing prohibited proved it, for if the sons only took an estate for life, this restraint would have been idle.

40. A person devised to his three daughters, to be equally divided; and if any of them died before the other, then the one to be the other's heir, equally to be divided; and if his three daughters died without issue, then he willed it to two strangers. Adjudged that the daughters took estates tail. King v. Rumball, Cro. Ja. 448.

41. A person devised land to his wife for life, and after to his son, and if his son died without issue, having no son, that another should have it. Adjudged that the son took an estate tail. Robinson v. Miller, 1 Roll. Ab. 837.

42. A man having issue two sons, devised all his land to his eldest son, and if he died without heirs male, then to his other son in like manner. Blaxton v. Stone, 3 Mod. 123.

The Court said, it was plain the word body, which properly created an estate tail, was left out; but the intent of the testator might be collected out of his will, that he designed an estate tail, for without

this devise, it would have gone to his second son, if the first had died without issue. It was therefore an estate tail.

Hope v. Taylor, 1 Burr. 268.

43. R. Johnson being seised in fee of a copyhold estate, devised to J. W. his house in the Brook and 30 *l.*; and to W. T., his sister's son, a house with the ground and outhouses thereto belonging; and declared his will and meaning to be, that if either of the persons before named died without issue lawfully begotten, then the said legacy should be divided equally between them that were left alive. Adjudged that W. T. took an estate tail.

Evans v. Astley, 3 Burr. 1570.

44. A person devised to the three sons of C. D. successively in tail male, remainder to every son and sons of the said C. D. which should be begotten on the body of Sarah his wife; and for want of such issue to W. H. &c.; with a proviso that the devisees and their descendants should take the sirname and arms of the testator.

The Court resolved, that the after-born sons took several estates in tail male, in succession; as the words, for want of such issue, must be construed, for want of heirs male of the body; and that this was the true construction.

Denn v. Slater, 5 Term R. 335.

45. A person devised in these words: "I give and bequeath all my copyhold lands to my nephew Isaac Slater; but if the aforesaid Isaac Slater shall die without male heir, then my will is, that my nephew John Slater shall enter upon and enjoy the said copyhold lands, his heirs or assigns for ever: provided the aforesaid Isaac Slater paid to his wife Elizabeth the sum of 8 *l.* a year during her life, with a power of entry to the wife if the annuity was not paid.

It was contended that Isaac took a fee by reason of the annuity.

Lord Kenyon said it was clear, from all the cases on the subject, that Isaac took only an estate tail. He cited the case of Blaxton v. Stone, and Burley's case, 43 Eliz., stated by Lord Hale in 1 Vent. 230; which was a devise to A. for life, remainder to the next heir male; for default of such heir male, then to remain. Adjudged an estate tail.

With regard to the other question, the law was very accurately stated by Lord Mansfield in the case in Cowper, where an estate was given generally, without adding words which would create a fee, or an estate tail, and it was charged with the payment of annuities; the devisee took a fee; but that was not the case where an estate tail was given to the devisee. Doe v. Fyldes, ante, § 6.

46. An express devise to a person for life may be enlarged by subsequent words, or by a necessary implication, into an estate tail: for where an estate is devised to a person for life, with a limitation over, which is not to take effect while there is any issue of the devisee for life, if there are no words in the will under which the issue can take as purchasers, the courts, in order to carry the manifest general intent of the testator into effect, have disregarded the particular intent, and by enlarging the estate devised for life into an estate tail, have let in all the issue of the first devisee. A Devise for Life may be enlarged into an Estate Tail.

47. Lands were devised to A. for life, without waste, with a power to make a jointure; remainder to his first, second, and so to his sixth son, and no farther; after which followed these words, "if A. should die without issue male of his body, then to B. in fee." Langley v. Baldwin, 1 P. Wms. 759. Fitzg. 13. 8 Mod. 258.

This case having been sent out of Chancery to the Court of C. B., it was resolved there, that there being no limitation beyond the sixth son, and for that there

might be a seventh, who was not intended to be excluded, therefore to let in the seventh and subsequent sons to take, but still to take as issue and heirs of the body of A. in tail by descent, and not by purchase, the Court held the words, "in case A. should die without issue male of his body," did in a will make an estate tail.

Stanley v. Linnard, Amb. 355.

Att. Gen. v. Sutton, 1 P. Wms. 173.

48. J. Sutton devised a house to his nephew Thomas Sutton for and during the term of his natural life, and after his death, to the first son or issue male of his body, lawfully begotten, and to the heirs male of the body of such first son; and for default of such issue, to the second son or issue male of the body of the said Thomas, lawfully to be begotten, for ever. And from and immediately after the death of the testator's wife, and of his said nephew Thomas Sutton, without issue male of his body, or after the death of such issue male, he devised all the said premises to trustees for charitable purposes.

It was resolved by the Court of Exchequer, that Thomas Sutton took an estate tail by implication.

3 Bro. Parl. Ca. 75.

On an appeal to the House of Lords it was insisted on behalf of the appellants, that it was most manifestly the intention of the testator, that his nephew Thomas Sutton, who was not his heir at law, should have no greater estate than for his life only; and accordingly the estate was expressly limited to him for and during the term of his natural life, with remainders to his sons as purchasers. That it could not be pretended there were any words in the will which in a deed could possibly have created an estate tail in Thomas Sutton: if therefore any such estate was created, it must be by implication, or presumption of the testator's intention, and not by the legal import or construction of the words themselves;

but that such an implication was directly contrary to the express declaration of the testator in almost every branch of his will, as well as destructive of the charities which he intended to establish.

On the other side it was argued, that under the testator's will, Thomas Sutton took an estate tail by implication, the remainder being after his death without issue male. As to the objection that the limitation after his death, without issue male of his body, was to be understood, such issue male as was mentioned in the will, viz. his first and second sons; it was answered that all the issue male which Thomas Sutton might possibly have, viz. his third, fourth, and every other son and sons, not being expressly provided for by the will, the limitation after his death without issue male, raised the same estate to him by implication, as if it had been limited to him and his issue male, in express words.

The decree of the Court of Exchequer was affirmed.

49. On a trial at the great sessions for the county of Flint, the jury found a special verdict, that T. Ravenscroft had devised lands to trustees and the survivor of them, in trust for his sisters Ann and Dorothy, equally between them, during their natural lives, without committing any manner of waste: and if either of his said sisters happened to die leaving issue or issues of her or their bodies, then in trust for such issue or issues of the mother's share, or else in trust for the survivor or survivors of them, and their respective issue or issues: and if it should happen that both his said sisters died without issue as aforesaid, and their issue or issues to die without issue or issues, then the trustees to stand seised for his kinsman John Swift, and the heirs male of his body.

Sparrow v. Shaw, 3Bro. Parl. Ca. 120.

The court of great sessions determined that Dorothy, having survived her sister Ann, was tenant in tail of one moiety under the devise, and of the other moiety as a remainder, upon the death of her sister without issue.

Shaw v. Weigh, Fitzg. 7. vide c. 14.

Upon a writ of error in the Court of K. B., Lord Ch. J. Raymond delivered the opinion of the Court, in a long and elaborate argument, that Ann and Dorothy took only an estate for life: that the word issue, in the first place, was a word of purchase, and the subsequent words were words of limitation, and created an estate tail in such issue. Consequently the judgment of the court of great sessions was reversed.

A writ of error was then brought in the House of Lords, where it was argued on behalf of the plaintiff in error, that by the words and intention of the will, the testator's two sisters Ann and Dorothy had an estate tail, as tenants in common, with cross remainders of their several moieties; and as Ann died without issue, Dorothy became entitled to the whole estate; for that in construction of law, a devise to one with a limitation over to another, if such first person dies without issue, creates an estate tail in that person, as well as if the devise had been to him or her, and the heirs of his or her body.

For the defendant in error it was said to be a known rule in the construction of wills, that the intention of the devisor ought in all cases to be observed, if it can be, consistent with the rules of law. Now this devise was expressly to the sisters during their natural lives, with the addition of this restrictive clause, without committing any manner of waste, which showed the intent of the testator strongly, that his sisters should only have an estate for life; for if he had intended them an estate tail, he could not

have restrained them from committing waste. That the next devise was to the issue of the sisters, with the limitations annexed thereto, as in the will; and it was contended for by the plaintiffs in error, that the word issue was a word of limitation, and should raise an estate tail in the sisters. But it was hoped that issue would here be construed as a word of purchase, and a designation of the persons intended to take the estate, in which case it could never extend to enlarge the estate given to the sisters for life. In a will it might sometimes be taken as a word of limitation, to answer the testator's intention, where such intention appeared manifestly from the construction of the whole will. But in the present case it was plain the testator intended that the issue of his sisters should take by purchase, and therefore he made use of the word issue as a designation of the persons who were to take; for he did not barely give the estate to the issue or issues of his sisters, but further devised it to the survivor or survivors of them, and their respective issue or issues, that is, to the issue or issues of such issue or issues as his sisters should leave; for the word survivors in the plural number was not applicable to the sisters, there being but two of them, but must relate to their issue. The first limitation therefore was to the issue of the issue, whence the first issue, to whose estate this limitation was annexed, must take by purchase.

It had been objected that the word issue was *nomen collectivum*, and should take in all the descendants, and consequently create an estate tail in the sisters. But the word issue was only to be understood in this sense when it was a word of limitation; for it had always been taken in a different sense when it was a word of purchase. It had also been

insisted on, that an estate tail should be raised in the sisters by implication, from these words, *if it shall happen that both my said sisters die without issue as aforesaid, and their issue or issues to die without issue or issues*, then the subsequent remainders were given. Wherever an estate tail had been raised by implication, it had been to answer the apparent intention of the testator; but in the present case the very words from which an estate tail was to be implied, showed that the testator took notice that he had before limited the estate to the issue of the issue. Besides, the words were not general, *if both my said sisters die without issue;* but, *if both my said sisters die without issue as aforesaid*, which showed the testator's intention not to enlarge the estate before given to his sisters.

The Judges attended, and having conferred with the Lord Chancellor, his Lordship acquainted the house, that the Judges of the King's Bench were of the same opinion they were when they gave judgment in this case; but that there was a difference of opinion in the Judges of the Common Pleas and Barons of the Exchequer, who desired time to confer, in order to be more clear in their opinions. Some days after, all the Judges attended; and after delivering their opinions *seriatim* in relation to a point of law to them proposed, it was ordered and adjudged that the judgment given in the Court of King's Bench, reversing a judgment given in the court of great sessions, should be reversed; and that the judgment of the court of great sessions should be affirmed.

Robinson v. Hicks, 1 Burr. 38. 2 Ves. 225.

50. G. Robinson devised a real estate to Launcelot Hicks, for and during the term of his natural life, and no longer; provided he altered his name and

took that of Robinson, and lived at his house at Bochym; and after his decease, to such son as he should have, lawfully to be begotten, taking the name of Robinson; and for default of such issue, then he bequeathed the same to his cousin W. R. and his heirs for ever.

Upon a bill to establish this will, and to carry the trusts of it into execution, Sir Joseph Jekyll declared that Launcelot Hicks, *alias* Robinson, was entitled to an estate for life, with remainder to his eldest and but one son, for his life; and that the remainder would go over to W. R.

On an appeal from this decree, Lord Talbot affirmed it, as to the interest which L. Hicks took in the testator's estate under his will, by a declaration in the very words of the former decree.

Launcelot Hicks had two sons, George, who died an infant, and Edmund, who filed another bill against W. R. the devisee in remainder, and the trustees, for an execution of the trusts of the will.

Lord Hardwicke ordered a case to be made for the opinion of the Court of K. B. upon the following question:—"Whether any and what estate or interest in the premises in question, did, by virtue of the said will, vest in the said Edmund."

The Judges certified their opinion, that upon the true construction of the will, Launcelot Hicks must by necessary implication, to effectuate the manifest general intent of the testator, be construed to take an estate in tail male; he and the heirs male of his body taking the name of Robinson; notwithstanding the express estate devised to the said L. Hicks for his life, and no longer.

The cause coming on to be heard on this certificate, before the Lords Commissioners, they confirmed it.

3 Bro. Parl. Ca. 180.

On an appeal to the House of Lords, it was argued on behalf of the appellant, that the greatest difficulty occurring in the construction of wills was, to form a true judgment where the presumed general intent of a testator ought to prevail, and where the legal operation of his words should take place. If the intention could be collected clearly from plain decisive evidences, such as had been received and allowed in courts of law and equity, by the current of authorities in similar cases, it must prevail. But if, on the one hand, the presumed intention be obscure and ambiguous, not necessarily implied in the words, and wholly inconsistent with the legal operation; and if, on the other hand, the legal operation produces a clear uniform sense, without contradiction or absurdity; that construction ought to be preferred which explains the intention of the testator with the least violence to his words. That though this case arose upon the devise of a trust, yet the Court of Chancery, in sending it to a court of law, judged that it ought to be governed by the same rules of construction as the devise of a legal estate; and it was submitted that the will afforded no strong coercive legal evidences of intent, such as must induce a court of law, from the necessity of his meaning, to over-rule the legal operation of his words, and vest an estate of inheritance in tail male in L. Hicks, in prejudice to his heir at law.

It would serve to explain the grounds on which the appellant proceeded, if it was considered, 1°. What estate was devised to L. Hicks the father; 2°. What estate was devised to his son. As to the first question the testator had not left the possibility of a doubt, if his express declaration deserved any weight. He devised all his estate to L. Hicks the father for life,

and no longer; enforcing his devise by negative words, which had hitherto been allowed, in all the cases adjudged, to be sufficient to prevent any implication by way of enlarging the estate, and extending the duration of it; so that the decree of the Court of Chancery, grounded upon the certificate of the Court of K. B., controlled not only the legal force of the words, but their meaning in common use, and in effect expunged them out the will: that as all the authorities concurred against enlarging an estate for life into an estate of inheritance, where negative words were added, to strengthen the express devise; so likewise they were uniform in not raising an estate tail by implication in the tenant for life, either by way of present estate in possession, or by way of remainder in tail, after other limitations, unless the testator had limited express estates of inheritance to some of the sons or issue of the ancestor, tenant for life, *nominatim*, or by description; and then devised over the lands to another family, in default of issue *generally* of that ancestor. But this was the first case in which it had been held that the tenant for life took an estate tail by implication, in virtue of the connecting words, "for want of such issue," where the default of issue on which the implication was raised, was not general, but relative, by force of the word *such*, to a particular antecedent limitation; and where that antecedent limitation was made only to one son of the tenant for life, without any collective description of his heirs male, or heirs of his body, and without any words devising an inheritance to that son.

As to the second question,—what estate was devised to the son of L. Hicks?—if the father took only an estate for life, there was no colour to say that any one

could entitle himself as devisee of an estate of inheritance, by words of purchase in the will. The devise was made, after the death of L. Hicks, to such son as he should have: no express words of limitation were annexed to it, to give an inheritance; no words on which it could be implied: the only doubt arising on some words which referred clearly to a failure of issue (whether a general or limited failure was the question), not of the son, but of the father; hence it followed that the son intended by the will could only take an estate for life.

In support of the decree, it was contended that the words son, children, issue, and heir, in a will, where no son was in being at the time of the devise, were *nomina collectiva*, and sufficient to create an estate of inheritance, and carry the land, not only to the immediate heir or issue, but to all that descended from the devisee: that the testator in this case could not have any particular person in view to take, but the issue male of L. Hicks in a collective sense, was clear; because at the time of making his will L. Hicks was a bachelor, and therefore to suppose he could mean to give a life estate only to some one son of L. Hicks, not then in being, would be a construction equally illiberal and absurd: that this was made still plainer by the words which followed, namely, "for default of such issue;" for these words explained what kind of an estate, as to its continuance or duration, the devisee should take, and were so frequently used to denote an estate tail, that they were become almost technical; so that express words were hardly better to be understood than the implication arising from this phrase: that in the case of wills the testator was *inops consilii*, and had not always opportunities of observing the formalities of law: and it was

a general rule that the intention of the testator was to govern in the construction of wills; and that the judges would go as far as they could to assist and give effect to such intention; and therefore as the word son would in a will signify an estate tail, as well as the words issue or children, it was insisted that the devise in the will must, by consequence and operation of law, to manifest the intent of the testator, be construed to create an estate tail.

The Judges were directed to give their opinions upon the following question:—Whether any and what estate or interest vested in Edmund Hicks? to which the Lord Ch. B. delivered their unanimous opinion, that an estate in tail male was vested in Edmund Hicks, as heir male of the body of Launcelot Hicks: whereupon the decree was affirmed.

51. A. Dymock devised to his nephew, William Dymock, all his freehold estate at A., to hold to him during his natural life; and after his decease, to and amongst his issue; and in default of issue, to be divided between his nephew and niece, their heirs and assigns for ever. Doev. Applin, 4 Term R. 62.

Lord Kenyon.—"Although this will is very inaccurately drawn, I think we may collect the devisor's general intention, from the words of it. The great question in this case is, what estate W. Dymock took under the will? In the first clause the estate is expressed to be given only during his natural life; but in the next limitation, it is to go to his issue, and in default of issue only, it was to go over: it is clear, therefore, from the whole of the will, that the devisor did not intend that it should go over to those in remainder, until after a general failure of issue in W. Dymock. Now I think we are warranted by many determinations, and particularly by that of Robinson

v. Hicks, to give that effect to the will which will best answer the devisor's *general intention*, though by so doing we may defeat some *particular intent*. Here the general intent was, that W. Dymock and his issue should take first: then what construction will best effectuate that intention. It has been argued by the plaintiff's counsel, that W. Dymock took only an estate for life, and his children an estate tail; but it would be difficult to put two different interpretations on the word issue; and even if that could be done, it would not further the intention of the devisor in this case; for there are no cross remainders to the children, and they never can be implied; so that according to the construction contended for, if one of the children died, his share would go over to those in remainder, in prejudice of those children who survived, which was certainly not intended by the devisor. Therefore we shall best answer his general intent by saying that W. Dymock took an estate tail; and in so determining we shall not go farther than has been done in other cases." Judgment was given accordingly.

Doe v. Puckey, 5 Term R. 299.

Doe v. Smith, 7 Term R. 531.

52. A person devised all his freehold messuages, &c. to his daughter Mary Ayscough, and the heirs of her body lawfully to be begotten for ever, as tenants in common and not as joint tenants; and in case his said daughter should happen to die before twenty-one, or without having issue on her body lawfully begotten, then he gave his freehold messuages to R. Ayscough in fee.

Lord Kenyon said, it was a rule of construction in cases of this kind, settled by a variety of decisions, but particularly by that of Robinson v. Hicks, that where it appeared in a will that the testator had a general intention, and also a secondary intention,

and they clashed, the latter must give way to the former. Here were no words of limitation added to the estate given to the children (supposing they took as purchasers), and yet the remainder over was not to take place till there was a general failure of her issue; so that there must be an estate to comprehend all her children for ever. He concluded in these words:—"I admit that in this case the testator intended that his daughter M. A. should only take an estate for life, and that her children should take as purchasers; but then he also intended that all the progeny of those children should take before any interest should vest in his more remote relations: now the latter intention cannot be carried into effect unless M. Ayscough takes an estate in tail; in order therefore to give effect to the devisor's general intention, according to the fair construction of the will, M. Ayscough must take an estate tail."

53. H. Cook devised a messuage to R. Cook for the term only of his natural life; and after his decease, he gave and devised the same unto the lawful issue of the said R. Cook, as tenants in common; but in case the said R. Cook should die without leaving lawful issue, then and in such case, after his decease, he gave and devised the same to Eliz. Harding in fee. Doe v. Cooper, 1 East, 229.

Lord Kenyon said, it had been the settled doctrine of Westminster Hall, for the preceding forty or fifty years, that there might be a general and a particular intent in a will; and that the latter must give way, when the former could not otherwise be carried into effect. That this doctrine had been confirmed by the cases of Robinson v. Hicks, Roe v. Grew, c. 14. and others. That perhaps the Court would best fulfil the particular intent of the testator in this case,

by giving R. Cook only an estate for life; but the general intent was, that all his issue should inherit the entire estate, before it went over; and that intent could only be answered by giving him an estate tail, by implication from the subsequent words, in default of his leaving issue.

Pearson v. Vickers, 5 East, 548. Wight v. Leigh, 15 Ves. 564.

Judgment was given accordingly.

54. Where an estate for life is devised to a person, with a subsequent devise to his heirs or to the heirs of his body, the devisee will take an estate in fee or an estate tail; in consequence of a rule of construction which will be stated hereafter.

vide c. 14.

TITLE XXXVIII.

DEVISE.

CHAP. XIII.

Construction—What words create an Estate for Life, a Term for Years, and uncertain Interests.

1. *Where an express Estate for Life is devised.*
5. *Though a Power of Disposal be given.*
9. *A Devise without any Words of Limitation.*
25. *Though charged with a Payment out of the Estate devised.*
33. *Or an Annuity during the Life of the Devisee.*
35. *The word Estate when descriptive of local situation.*
38. *The word Hereditament.*
39. *Where the general Intention requires it.*
43. *What words create a Term for Years.*
45. *And uncertain Interests.*

Section 1.

Where an express Estate for Life is devised.

IT has been stated in the preceding chapter, that although an express estate for life be devised, yet if the general intent of the testator require that the issue of the devisee for life should take by descent from him, the courts have enlarged his estate into an estate tail: but where the manifest general intent of the testator does not require that the estate for life expressly given should be enlarged into an estate tail, the devisee will only take an estate for life, in consequence of the rule that *expressum facit cessare tacitum*: and it is observable that the doctrine of carrying the general intent into effect, in contradiction to the particular intent, is of a modern date.

1 Roll. Ab. 837. pl. 13.

2. A person devised to his eldest son for life, remainder to the sons of his body lawfully begotten, and if they aliened, that his daughters should have the same estate, remainder to his right heirs. It was resolved that the eldest son had but an estate for life, and that his son should have it by purchase; because it was expressly limited that he should have it only for life.

1 Vent. 231.

Lord Hale says, the words in this case were; to his eldest son for life, *et non aliter*, and that it was held to be an estate for life by reason of the words *non aliter*.

Bamfield v. Popham, 1 P. Wms. 54.

3. A person devised his estate to trustees and their heirs, in trust for Popham for life, remainder to his first and other sons successively in tail male; and for want of issue male of Popham, to another person. Afterwards the testator by a codicil, reciting that he had by his will given the premises to Popham and the heirs male of his body, willed that if the estate should determine, and Popham should die without issue male, then his estate to be disposed of in a particular manner.

The questions were, first, Whether the words of the will, viz. for want of issue male of Popham, did not by implication give an estate tail to Popham. 2°. Whether, admitting the words in the will did not give an estate tail, the codicil, reciting that the testator had by his will devised the premises to Popham and the heirs male of his body, would not so far influence and explain the will, as to make it an estate tail, though it was not so before.

It was resolved unanimously that Popham had only an estate for life by the will; and that the same was not enlarged or altered by the codicil; for there being an express estate given to Popham for life,

with remainder to his first and every other son, &c. the words, if Popham should die without issue male, should not enlarge his estate to an estate tail, in regard these amounted only to make an estate tail by implication; and words of implication could never destroy what was before expressed; so that the words, if he should die without issue male, could mean no more than if he should die without sons.

4. A testator devised all his freehold estates to trustees, in trust to convey the same to Ewer Edgeley for life, remainder to trustees during his life to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to his daughters in tail general, as tenants in common; with power to E. Edgeley to make a jointure; and if he should die without issue, then he devised the premises over. Blackburn v. Edgeley, 1 P. Wms. 600.

It was contended that E. Edgeley, by virtue of the words, if he die without issue of his body, should have an estate tail in the premises; to which it was answered, that here was an express estate for life limited to E. Edgeley, and the words, if he should die without issue, being only words of implication, would not merge and destroy an express estate for life.

The Court exploded the notion that words of implication should not turn an express estate for life into an estate tail; and said that if I. devise an estate to A. for life, and after his death without issue, then to B., this will give an estate tail to A. according to Sonday's case: but here being a limitation, upon E. Edgeley's death, to his sons, and after to his daughters, the following words,—if E. Edgeley should die without issue, must be intended, if he should die without *such* issue. And as to what had been urged, that unless these words were to create an estate tail ante, c. 12.

in E. Edgeley, his son's daughters could not take; it did not appear that the testator intended E. Edgeley's son's daughters should take, for he might think that on E. Edgeley's dying without issue, his name and family would be determined; for which reason he might limit it over to the daughters of E. Edgeley himself. Besides, the son of E. Edgeley would be tenant in tail, and when of age might, by docking the entail, give the premises to his daughters.

Though a Power of Disposal be given. c. 11. § 10.

5. Although a devise to a person generally, with a power to give and dispose of the estate devised as he pleases, creates an estate in fee simple; yet where an estate is devised to a person expressly for life, with a power of disposal, the devisee will only take an estate for life, with a power to dispose of the reversion.

Anon. 3 Leon. 71. 4 Leon. 41.

6. A person having two daughters, devised lands to his wife for life, and at her decease, she to give the same to whom she pleased. The wife granted the reversion to a stranger, and committed waste; the two daughters brought an action of waste.

It was held, that by the devise the wife had but an estate for life, with an authority to give the reversion to whom she pleased; and her grantee would be in by the will: for the testator had given his wife an express estate for life, and therefore she could not by implication have any greater estate: but if an express estate had not been given to the wife, by the other words, an estate in fee simple had passed.

Daniel v. Upley, Noy, 80.

Tomlinson v. Dighton, 1 P. Wms. 149.

7. J. Tomlinson devised lands to his wife for her life, and then to be at her disposal; provided it was to any of his children, if living; if not, to any of his kindred that his wife should please.

It was resolved by the Court of K. B. upon a writ of error from the C. B., that the wife had but an estate for life, with a power of disposing of the inhe-

ritance. And Lord Ch. J. Parker said, the difference was where a power was given with a particular description and limitation of the estate, as here, and where generally, as to executors, to give or sell; for in the former case the estate limited being express and certain, the power was a distinct gift, and came in by way of addition; but in the latter, the whole was general and indefinite; and as the persons intrusted were to convey a fee, they must consequently, and by a necessary construction, be supposed to have a fee themselves.

Hearle v. Greenbank, Tit. 32. c. 13. § 32. S. P.

8. John Russell by his will gave a legacy of 1000*l.* to his son Richard, and an estate in fee to a nephew; and then directed his executrix to lay out 2000*l.* of his personal property in the purchase of freehold estates, within twelve months after his decease. The estates so to be purchased, together with four messuages in Johnson's-court, Fleet-street, and elsewhere, and the reversion of others (describing them all), and all his leasehold estates, he gave to his wife Rebecca for her life, and from and immediately after her decease, to his son Richard and his issue lawfully begotten or to be begotten, to be divided among them as he should think fit; and in case he should die without issue, he directed that all, as well his present freehold and leasehold, as the estates directed to be purchased, should be sold, and the money arising from the sale should be divided among the children of his brother Russell, and of his sisters Willis and Parks, equally. There was a subsequent direction that no part either of his present freehold and leasehold, or of the estate so directed to be purchased, should be sold during the lives of his wife and son. All the rest, residue, and remainder of his property and effects whatsoever and

Hockley v. Mawbey, 1 Ves. Jun. 143.

wheresoever, after payment of debts, legacies, and funeral expences, he gave to his wife for her own use and benefit, for ever, and appointed her his sole executrix. The wife enjoyed under the will for her life, and after her death the son enjoyed for his life, and died without having had issue.

Upon a suit in Chancery to establish the will, one of the questions was, whether Richard Russell the son took an estate tail, or for life only, under the will.

Lord Thurlow said, it was clear to him that the testator intended, and he thought had pretty plainly expressed, a contingency with a double aspect: in one case, to the children of the son; in the other, to the other persons pointed out: to the children of the son in one way, to the other parties in another, viz. by settling it so as to distribute it among the great number of persons who might come within that description. The limitation to the son and his issue would be an estate tail, and perhaps the aptest way of describing an estate tail according to the statute; but it was clear he did not intend it to go to them as heirs in tail, for he meant they should take distributively, and according to proportions to be fixed by the son. It had often been decided, in other cases beside those mentioned at the bar, that where there was a gift in that way, the parties must take as purchasers, for there was no other way for them to take. The immediate consequence of this was, that Richard Russell could only take for life; and the consequence of that was, that this was a gift to the wife for life, then to the son for life, and after to his issue, in such distributive shares as he should appoint. It was then said that this might be interpreted to be a gift to the son in tail, with a power annexed to raise a future use upon it, of the description mentioned. As to

that, he apprehended that in case there had been children of the son, it was not intended to be left in his power to determine whether he should or should not consider it as his own, and raise a future use if he pleased; but the disposition gave an interest to his children, and a title to insist upon an estate in the premises so given, at all events; and then the son had no authority, but as to the proportions in which they were to take; but not to choose whether any thing should be given to them or not. Then the effect was like all other gifts to persons in remainder capable of being divided, but if not, equally; and that was the necessary consequence of the supposition he mentioned before, that he intended to vest an interest in the children of his son, independently of the son, except as to the proportions; and that even so as that they should not be illusory. It was observed that the word issue would extend to grand-children or any other degree of kindred, however remote; he thought it would be so, but only in this point of view, as a description of the objects among whom the power of the son was to obtain, to make such partition as he should think fit; and whosoever they were, they must be in existence during the life of the son, and he must have made it during his life; if so, it was of no consequence how they were described, for if it vested in him, it was of no consequence to say they were not the immediate descendants of the son. It was an estate devised upon two alternative contingencies; one, that there were objects capable of taking under the first limitation; another, that there were none such, but that there were objects capable of taking under the second. As to its being an estate tail by implication, it was contrary to reason and to common sense to impute that intention

to him, if only arising from his not having made a special devise of the estate in that form. The estate he was directing to be sold, and the estate supposed to be given to the son in tail, were the same; and if so given, it could not be sold by this power, and did not come within the range of what he had before directed: it was plain, therefore, he did not intend an estate tail; and he was himself clear upon that point.

Reid v. Shergold, 10 Ves. 370.

Decreed an estate for life.

A Devise without any Words of Limitation.

9. Where no words of limitation are added to a devise, and there are no other words from which an intention to give an estate of inheritance can be collected, the devisee will take only an estate for life.

1 Roll. Ab. 844. 1 Roll. Rep. 369. 1 Mod. 100.

10. If a man devise in this manner: "I devise Blackacre to my daughter F. and the heirs of her body begotten. *Item*, I devise unto my said daughter Whiteacre." The daughter shall have but an estate for life in Whiteacre: for the word *item* is not so much as *in the same manner*. But if a person devise Blackacre to one in tail, and also Whiteacre, the devisee shall have an estate tail in Whiteacre also; for this is all one sentence, and so the words which make the limitation of the estate go to both.

Price v. Archb. of Canterbury, 14 Ves. 364.

A person devised in these words: "I give and bequeath to H. my farm and lands at R., to him, his heirs and assigns for ever. And I also give and bequeath to the said H. my farm and manor of E."

Lord Eldon said, the only question upon this devise was, whether the word *also* had precisely the same operation as the addition of the words, his heirs and assigns for ever, in the devise of the other estate immediately preceding; and it seemed to him that all the old rules against disinheriting an heir, except by plain words or necessary implication were gone, if

such a construction was to prevail. Decreed an estate for life.

11. One Hawkins being seised in fee of three houses, devised them to his wife for life, the remainder of one to Robert his son and his heirs, the remainder of another to Christian his daughter and her heirs, and of the third to Joan his daughter and her heirs; and did further will, that if any of them died without issue, then the survivors should enjoy *totam illam partem*, equally divided between them. Pettywood v. Cook, Cro. Eliz. 52. 2 Leon. 129.

It was resolved, that the survivor only took an estate for life in the share of the others.

12. A person having three sons, B. C. and D., devised lands to B. in tail, remainder to C. in fee, and other lands to C. in tail, remainder to D. in tail; and then other lands to D. in fee. He afterwards said, "*Item*, I give Blackacre to my said son D.; *item*, I give to my said son D. Whiteacre. Also I will that all bargains, grants, &c. which I have from J. S., my son D. shall enjoy, and his heirs for ever; and for lack of heirs of his body, to my son C. for ever." Spirt v. Bence, Cro. Car. 368. Vaugh. 262.

It was agreed by all the Judges that the bargains and grants, &c. only were entailed; and that D. had but an estate for life in Blackacre and Whiteacre.

13. A person devised a house to his sons James and Thomas, and the heirs of their bodies, in equal moieties; and then added, but my will and mind is, that if any of my said children shall die before 21, or unmarried, the part or share of him or her so dying shall go over to the survivors. Woodward v. Glassbrook, 2 Vern. 388.

Lord Holt was of opinion that Thomas dying unmarried, his moiety went over to the survivor, and that by the devise over, only an estate for life passed.

14. In the case of Cook v. Cook, which has been stated in Ch. 10. § 44, Lord Cowper held, that the issue of J. S. only took an estate for life.

Roe v. Holms, 2 Wils. R. 80.

15. A person devised a copyhold estate to his daughter Jane, her heirs and assigns for ever; but in case his said daughter died before she attained the age of 21 years, and had no issue, then his will was, that his nephew J. Hardisty should have his said copyhold lands and tenements.

The Court was clearly of opinion that J. Hardisty took only an estate for life: that the testator by his devise to Jane plainly understood the force of words of limitation; and if he had intended to give his nephew more than an estate for life, he knew how to have done it: that there were no express words in the will that gave the nephew a fee, nor any manifest intention to do so, or to disinherit the heir at law.

Right v. Russell, cited Doug. 761.

16. A will began with these words, "As touching the disposition of such temporal estate as it has pleased God to bestow on me." And then the testator proceeded to give his house to his son S. Russell, and after his death then to the two sons of Samuel, named Thomas and William; and gave a legacy of one shilling to the husband of his heir at law.

It was resolved by the Court of Exchequer, that Thomas and William took only estates for life.

Roe v. Blackett, Cowp. 235.

17. B. C. being seised and possessed of freehold and leasehold property, lying contiguous, and demised together, devised to his wife all his freehold and leasehold messuages, &c. and all his estate and interest therein, for and during her natural life; and after her decease he devised the said messuages to his sisters in law, M. S. and M. B., as tenants in common; but in case his mother should give any disturbance to

his wife, then his will was, that the same should go to his kinsman W. B., his heirs and assigns for ever; and charged his estate with the payment of all his just debts, to be paid out of the yearly rents of his estate by his said wife.

Lord Mansfield said, there were no words of limitation added to this devise to the sisters in law; and therefore it was clear, by the rule of law, that it was only an estate for life; unless it could be found from the whole of the will taken together, and applied to the subject matter of this devise, that the testator's intention was to give a fee.

Judgment that the sisters in law took only an estate for life.

18. A person devised all his real and personal estate to his wife for her natural life, and at or immediately after her decease, he gave to his son Paul all that his land lying and being in Dudley, and gave to each of his grandchildren (one of whom was his heir at law) a legacy of five shillings. Roe v. Bolton, 2 Black. R. 1045. Doug. 761.

The Court was of opinion that Paul took only an estate for life.

19. John Gaskin began his will thus, "As to all such worldly estate as God has endued me with." He then gave all that his freehold messuage and tenement lying in G. to his three nephews, equally to them; and gave ten shillings to his heir at law. Denn v. Gaskin, Cowp. 657.

Lord Mansfield said, it was settled in devises, as well as in deeds, that if no words of limitation were added, the devisee could only take an estate for life, because the law implied an estate for life only, where there were no words of limitation: but as there were no technical words necessary in a will, if the testator made use of what was tantamount, as if

he said, I give to such a one in fee simple, or all my estate, that would carry all his interest in the land devised. But there must be words in the will to control the rule of law, which he believed in a variety of cases thwarted the intention of the testator. He suspected extremely, that in this very case the testator meant to give his nephews a fee in the premises in question; for he had no other landed property. He made them residuary legatees of his personalty, and gave a disinheriting legacy to his heir at law, agreeable to the vulgar notion, taken from the Roman law, that an heir is cut off with a shilling. But the single question was, whether the Court could find any words in the will to take this case out of the rule of law; if they could not, it must be adhered to. He said it was impossible to find words in this will sufficient to control the rule of law. There were no words that could connect the devise of the lands in question with the introduction, so as to pass the whole interest; therefore the devisees could only take an estate for life. Judgment was given accordingly.

Right v. Sidebotham, Doug. 759.

20. W. Sparrowhawk devised as follows:—"For those worldly goods and estates wherewith it has pleased God to bless me, I give and dispose of the same in manner following." Then gave one shilling to his heir at law; and after giving other legacies, came this clause,—"And I do give and devise unto Susan my said wife, her heirs and assigns for ever, all my lands lying in the parish of A. And I give and bequeath to my loving wife aforesaid all my lands, tenements, and houses lying in the parish of Chipping Norton." The question was, whether the last-mentioned premises were devised to the widow in fee, or for life.

Lord Mansfield.—"I verily believe that almost in every case where by law a general devise of lands is reduced to an estate for life, the intent of the testator is thwarted; for ordinary people do not distinguish between real and personal property. The rule of law however is established and certain, that express words of limitation, or words tantamount, are necessary to pass an estate of inheritance. All my estate, or all my interest, will do; but all my lands lying in such a place is not sufficient; such words are considered merely as descriptive of the local situation, and only carry an estate for life; nor are words tending to disinherit the heir at law sufficient to prevent his taking, unless the estate is given to somebody else. I have no doubt but the testator's intention here was to disinherit his heir at law, at well as in the case of Denn v. Gaskin. But the only circumstance of difference between that case and this, and which has been relied on as in favour of the defendants, if the testator had any meaning by it (which I do not believe he had), rather turns the other way, because he uses different words in devising different parts of his estate. I think we are bound by the case of Denn v. Gaskin. Judgment that the widow took only a life estate in the last-mentioned premises.

ante, § 19.

21. T. Nash devised lands to S. Nash for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of S. Nash, and the heirs male of his and their bodies; and for default of such issue, to the use and behoof of all and every the daughter and daughters of the body of the said T. Nash; and for default of such issue, to the use of the right heirs of the said T. Nash for ever. T. Nash had a daughter named

Denn v. Page, cited 1 Bos. 261. 11 East, 603.

Jane; and the question was, whether she took an estate for life or an estate tail.

Lord Mansfield.—"This question does not admit of much argument, nor of cases to be cited, for every case must depend upon its own circumstances. The rule of law is clear, that a grant by words of purchase without further limitation, enures for life only. When wills came to be in vogue, it pleased the Judges to consider them in their construction, with analogy to the rule of law respecting deeds, and not with analogy to the Roman appointment; and therefore they held that such a grant enured for life only. There is hardly an instance where the words of a devise are restrained to a life estate only, in which the intention of the testator is not contravened; for common men are ignorant of the difference between land and money. This being so, the courts have been astute to find out, if possible, from other parts of the will, the intention of the testator; the question then is, whether there be enough here, on the face of the will, for we must not go into conjecture. I conjecture that this was a blunder, and that another limitation was intended, but I do not know of what nature, whether to heirs general or special. Is there then any authority for supplying the defect, and making the will anew? Had the words been, if they die without issue, an estate tail would have been implied; but here the words are, for default of *such* issue, viz. that issue which is before mentioned. The Court has no power to strike out the word *such*; and if they did, what are they to supply it with? are they to give an estate in tail general or in tail male? There is no intention therefore apparent on the will to direct the Court."

Judgment that Jane took only an estate for life.

22. Sir R. Worsley being seised in fee of the premises in question, devised them to trustees, upon trust that they should stand seised thereof to the use of his grandson the earl of Granville for life, remainder to his first and other sons in tail male; remainder to Lady Carteret for life; remainder to her first and other sons in tail male; and in default of such issue, "to the use of all and every the daughter and daughters of the body of the said Lady Carteret lawfully issuing, as tenants in common, and not as joint tenants; and in default of such issue, to the use and behoof of his own right heirs for ever." Hay v. Coventry, 3 Term R. 83.

Lady Carteret had one daughter, Lady Catherine Hay; and the question was, What estate she took under this devise?

A case was sent out of Chancery to the Court of K. B. for their opinion.

Lord Kenyon.—"The general rule which is laid down in the books, and on which alone courts can with any safety proceed in the decision of questions of this kind, is, to collect the testator's intention from the words he has used in his will, and not from conjecture. It is not necessary that any technical or artificial form of words should be used in a will; but we must collect the meaning of the testator from those words which he has used, and cannot add words which he has not used. The objection then occurs in this case, *voluit sed non dixit.* The plaintiff's argument goes to show that the daughters took estates in tail general; but that could not have been the intention of the devisor, as no such estate is given in any part of the will, and the devisor has totally laid aside the daughters of the first devisee, and the daughters of his sons. The words here used, tech-

nically considered, only confer an estate for life on Lady C. Hay. It has been argued that we may presume an intention in the devisor, from other parts of the will, to give estates in succession to the daughters; but I cannot find any words in the will to warrant such a construction. If indeed the word *such* had not been introduced in this clause, we might perhaps have said that as issue is *genus generalissimum*, it should include all the progeny; but here the word *such* is relative, and restrains the words which accompany it. This case is precisely similar to that of Denn v. Page: there the Court held that sufficient did not appear on the face of the will to warrent them in saying that an estate of inheritance was given to the daughter: that if it were left to conjecture, they might suppose that some mistake had been made in the limitation; but they could not determine on conjecture, nor put that in the devisor's mouth which he had not said."

ante, § 21.

The certificate was, that Lady Catherine Hay took only an estate for life.

Foster v. Romney, 11 East, 594.

23. A person devised his estate to trustees and their heirs, until his nephew Thomas Foster should attain the age of 21 years, or die; and on his attaining 21, to the said Thomas for life; and after the determination of that estate, to the trustees, to preserve contingent remainders; and after the decease of Thomas, to all and every the son and sons of the body of Thomas severally and successively one after another in priority of birth, &c.; and for default of such issue, to the trustees, until another nephew should attain 21, and then to him in the same manner.

Upon a case sent out of Chancery for the opinion of the Court of K. B., as to what estate Thomas

Foster the nephew, and his eldest son, took; that Court certified that they respectively took estates for life only. Doe v. Goff, 11 East, 668.

24. Lord Mulgrave having an only daughter and three brothers, devised his estate in trust for his first and every other son in tail male; "failure of such issue, to my brother Henry, and his first and every other son in tail male;" and so on to his two other brothers in the same words, and then to his daughter in the same manner; and concluded with these words, "in all the foregoing cases without impeachment of waste, other than wilful." Then after making a provision for his daughter to the amount of 20,000 *l.*, the will proceeded thus: "My will is, that the money lodged at Childs, to pay for the purchase of the Lyth rectory, be applied to that purchase, as soon as Sir J. Sheffield can complete the title; and the renewals to be made by the tenant for life." It appeared that Sir J. Sheffield held the rectory of Lyth for three lives, under the see of Canterbury. Doe v. Mulgrave, 5 Term R. 320.

Lord Kenyon.—"The words, first and every other son, children, or heir, may be taken to be words of limitation, where it is necessary to give them that construction, in order to effectuate the intention of the testator, as in Robinson v. Hicks, though ordinarily speaking they are words of purchase: but in this case no doubt can be entertained respecting the devisor's intent. First, he devised to his own first and every other son in tail male, and if he had no issue, then to his brother Henry and his first and every other son in tail male, &c. Now, if he had given instructions to a conveyancer to draw his will, and to make his brothers tenants for life, and their children tenants in tail, these are precisely the terms in which he would have given such instructions: and

ante, c. 12. § 50.

in construing wills we must take into consideration the short hints of the devisor, in order to discover his intention. To be sure, if the objection, *voluit sed non dixit*, had occurred, it could not have been got over; we could not have inserted words in a will which would have varied the construction of those used, even if we thought that the devisor had intended to have used them: but here the intention is sufficiently explained by the words which he has used; and great weight is also due to the subsequent words, which direct the renewal of the life estate to be made by the *tenant for life*; for they can only apply to the devisor's brothers, since there was no other person who could take a life estate under the will. In some of the cases, indeed, nice distinctions have been made, to whom the word heirs should be applied; but without entering into those niceties, because it is unnecessary in this case, where the devisor's intention may be collected from different parts of the will, I am clearly of opinion that, on the fair construction of the will, the present Lord Mulgrave only took a life estate, with remainder in tail to his issue."

Though charged with a Payment out of the Estate devised. ante, c. 11. §. 48. 6 Rep. 16 *a.*

25. It has been stated that a devise to a person without any words of limitation, charged with the payment of a gross sum of money, or of debts, or annuities, creates an estate in fee simple. But it is laid down in Collier's case, that a devise to a person to the intent that with the profits he should educate his daughter, or out of the profits of the land pay to one so much, and to another so much, was but an estate for life; for he was sure to have no loss.

Ansley v. Chapman, Cro. Car. 157.

26. W. Lock being seised in fee, and having several sons, and being bound in an obligation that 40 *l.* should be paid annually to his wife during her life, made his will, and thereby devised all his lands, by

several clauses, to his several sons; and amongst others, he devised the lands in question to his sons Michael and Henry; and added this clause: "*Item*, all the houses and lands which I have given between my sons, is to this purpose, that they all shall bear part and part alike, going out of all my houses and lands, towards the payment of my wife's 40 *l. per annum* during her life, which I am bound to pay."

The Court resolved that an estate for life only passed by this devise, for it was not devised, paying a sum in gross, but that every one should pay out of his part towards the 40 *l.* to his wife; which was *quasi* an annual rent out of the profits of the land, and no sum in gross; and therefore no fee was given.

27. J. Toby devised all his lands and goods, after his debts and legacies paid, to his children R. and M. Toby, equally to be divided between them. Dickens v. Marshall, Cro. Eliz. 330.

The Court resolved that only an estate for life, passed; for although the devise of the lands and goods were coupled together, and it was a devise for ever of the goods; yet for the land, there being no words to give the inheritance, only an estate for life passed. And although it was objected that the devise of the lands was, after his debts and legacies paid, yet that did not enlarge it.

28. A person gave all his lands, tenements, and messuages whatsoever, after debts and legacies paid, and funeral expences were discharged, to J. M. Merson v. Blackmore, 2 Atk. 341.

It was said by Mr. Fortescue, M. R. that where a gross sum was to be paid out of the lands devised, it gave a fee to the devisee of those lands; but here the debts were not at all events charged upon the real estate, but only contingently, if the personal estate should be deficient; and therefore did not

come up to the cases cited of a gross sum to be paid out of land: and consequently gave no more than an estate for life to the devisee.

29. It has been laid down in two modern cases, that where the payment of a gross sum of money, or of debts and legacies, is charged on the estate devised, and not on the devisee, such a charge will not operate so as to give the devisee an estate in fee; and therefore, if no words of limitation are added, he will take no more than an estate for life.

Denn v. Mellor, 5 Term R. 558.

30. A person devised as follows—"I give and devise unto N. Lister all that my customary estate, &c. All the rest of my lands, tenements, and hereditaments, either freehold or copyhold, whatsoever and wheresoever; and also all my goods, chattels, and personal estate, of what nature or kind soever, after payment of my just debts and funeral expences, I give, devise, and bequeath the same unto my wife Sissily Carr," and appointed her sole executrix.

The question was, whether Sissily Carr took an estate in fee, or only for life.

Lord Kenyon said, where a devisee is directed to pay an annual rent-charge or a solid sum to another person, out of the estate devised, it had been properly decided that the devisee should take a fee, because he might be a loser unless the estate in his hands were at all events sufficient to enable him to bear those charges. Where a sum of money was given, it might be payable before the rents became due; and where an annual charge was made on the estate, it might continue beyond the life of the devisee; and therefore it was necessary in both those cases that the devisee should have a permanent fund. That this case had been compared to that of Doe v. Richards; but there the words were, my legacies and

ante, c. 11.

funeral expences being *thereout* paid; which imported that those sums were to be paid by the devisee out of the interest given to her; and if she had died immediately after the devisor, and had only taken a life estate, the fund out of which she was to bear those charges might have failed: the Court was therefore compelled to make that decision, and he was now perfectly satisfied with it. But in this case the words of the will were, after payment of my just debts and funeral expences. Now supposing the devisor had in the beginning of the will charged his debts and funeral expences on his real estate, and had then, after a series of limitations, devised to his wife in the words here used, it could not have been contended that such a charge on the real estate would have passed the fee to his wife; and if not, the place in which the same words were introduced could not vary the question. He admitted that the real estate was charged with the payment of debts and funeral expences, if the personalty was not sufficient for that purpose; but there were no words charging the estate in the hands of the wife with the payment of those debts. This therefore essentially differed the present case from that of Doe v. Richards; for there the debts were to be paid by the devisee, and were a charge on the estate in his hands; whereas here the debts were no charge on the devisee.

Judgment was given that Sissily Carr took only an estate for life.

On a writ of error in the Exchequer Chamber, this judgment was reversed, upon the ground that the words, all the *rest* of the real estate, created an estate in fee. 1 Bos. 558.

7 Bro. Parl. Ca. 607.

A writ of error was then brought in the House of Lords, where the following question was put to the Judges:—What estate the devisee Sissily Carr took in the premises in question? to which the Lord Ch. B. of the Exchequer delivered their unanimous opinion, that Sissily Carr took an estate for life; whereupon the judgment of the Court of Exchequer Chamber was reversed, and that of the Court of King's Bench affirmed.

31. Previous to the hearing of this case in the House of Lords, the following case was determined by the Court of K. B., in conformity to the doctrine laid down by that Court in the preceding case.

Doe v. Allen, 8 Term R. 497.

32. A person made his will in these words: "As to what real and personal estate it hath pleased Almighty God to bless me, I give and dispose of the same as followeth: first, my will is, that all my debts and funeral expences be justly paid off and discharged out of my personal estate; and if the same shall fall short, I do hereby charge my real estate with the payment of the same. I do hereby give and devise all my messuages, lands, tenements, and hereditaments whatsoever, situate lying and being, &c., unto W. Allen." And the question was, what estate passed by these words.

Lord Kenyon said, that the debts were not at all events charged upon the real estate, but only contingently, if the personal estate should not be sufficient, and therefore did not come up to the cases cited, of a gross sum to be paid out of the land devised, and consequently the words gave no more than an estate for life to the devisee.

Judgment was given accordingly.

Or an Annuity during the

33. It has been stated in a former chapter, that a devise of land, charged with an annual payment to a

third person for life, creates an estate in fee: but it is otherwise where the annual payment is only to continue during the life of the person to whom the land is devised. Life of the Devisee. c. 11. § 64.

34. A person devised lands to D. his wife, yielding and paying therefore yearly during her natural life, to the right heirs of his father, forty shillings, &c. Ager v. Poole, Dyer, 371.

The Court was of opinion that D. took only an estate for life.

35. It has been stated in a former chapter, that the word estate will create a fee simple, when it appears to have been used by a testator to denote all his interest in the lands devised; but where it appears to have been used as descriptive of the local situation of the lands devised, it will then pass only an estate for life. The word Estate when descriptive of local Situation. ante, c. 11. § 25.

36. Upon an appeal to the King in Council from a decree made in the Island of Antigua, the case was:— A person having real and personal estate, gave and bequeathed one third part of all his estate whatsoever to his wife Ann; and devised to his son John, and to his heirs, two thirds of all his real and personal estate. Chester v. Painter, 2 P. Wms. 335.

It was determined by Lord Ch. J. Raymond, Sir J. Jekyll, and Lord Ch. J. Eyre, that the wife took only an estate for life; the word estate being rather a description of the thing itself, than of the testator's interest in it: and by the next clause it appeared, that where the testator intended to give a fee, there he took care to add the word heirs to the word estate.

37. A person having devised his estate to his nephew Thomas Hutton and his heirs, added these words:—"And if my said nephew shall have no issue male, then my said estate shall go to the daughter or daughters of my brother Richard, and to the daughter Rogers v. Briggs, And. R. 210.

or daughters of my brother Mathew, remainder to his right heirs."

The question was, whether by the devise to the daughters of Richard and Mathew, an estate in fee or for life passed.

The Court was clearly of opinion that an estate for life only passed to the daughters: for as it was argued that although in wills the word estate was sufficient to carry a fee, yet in this case, where the consequence was the disinheriting an heir at law, a fee should not pass thereby, unless the intent of the testator was very plain and apparent for that purpose. That the intent was not so apparent as to force the Court to put such a construction on the devise to the daughters as was insisted on; but on the contrary, from the contexture of the whole will, it seemed plain that the word estate was always, and particularly in the devise in question, used as descriptive only, and synonymous with lands; so that here it would be putting a force on it to make it carry a fee. And besides, the devise over to the testator's heirs showed that he thought he had a farther interest to dispose of, after the devise to the daughters, to whom he did not seem to intend so much as an estate tail.

Goodright v. Barron, 11 East, 220.

Judgment that the daughters of Richard and Mathew took only estates for life.

The word Hereditament. 5 Term R. 559. 8 Id. 503.

38. The word *hereditament* only creates an estate for life in a will; for it does not denote the measure or quantity of the estate, as it has a proper and appropriate meaning, and extends to annuities, advowsons in gross, and many other things.

39. There are several other cases where an estate for life only has been held to pass by a devise, which will be stated in the next chapter.

39. Although an estate be devised to a person and the heirs of his body, yet if the general intention of the testator can only be carried into effect by construing the words heirs of the body to be words of purchase, the devisee will only take an estate for life. Where the general Intention requires it. Leonard v. Sussex, infra, c. 14.

40. A person devised to his son B. J. and his heirs lawfully to be begotten, that is to say, to his first, second, third, and every son and sons lawfully to be begotten of the body of the said B. J. and the heirs of the body of such first, second, third, and every son and sons successively, lawfully issuing; and in default of such issue, then to his right heirs for ever. Lowe v. Davies, 2 Ld. Raym. 1561.

It was resolved that B. J. took only an estate for life, the word heirs being fully explained by the subsequent words, to be a word of purchase. Doe v. Goff, 11 East, 668.

41. Lands held in gavelkind were devised to Ann Cornish and the heirs of her body lawfully begotten or to be begotten, as well females as males, and to their heirs and assigns for ever; to be equally divided, share and share alike, as tenants in common, and not as joint tenants. Doe v. Laming, 2 Burr. 1100. 1 Black. R. 265.

Lord Mansfield said, that the devise could not take effect at all, but would be absolutely void, unless the heirs of the body of Ann Cornish took as purchasers. The lands devised were gavelkind, and it was manifest the testator did not mean that his estate should go in a course of descent in gavelkind, for he gave it to the heirs of the body of Ann Cornish, as well females as males; therefore they could not take otherwise than as purchasers. It would be a void devise if the words were to be construed as words of limitation; for the testator breaks the gavelkind descent, by giving it to females as well as males. He like-

wise added, "and to their heirs and assigns for ever to be divided equally share and share alike." Nay, he went farther, "as tenants in common and not as joint-tenants." But this could not be, if they were to take in a course of gavelkind descent, for in such case they must take as coparceners. Upon the whole, as no man could doubt of the testator's intention, and as this was the only method of effectuating it, and as there was no rule of law that prevented heirs taking as purchasers, where the intention of the testator required it, so he was of opinion that the words, heirs of the body, were words of purchase. Judgment was given accordingly.

Doe v. Burnsall, 6 Term R. 30.

42. A person devised to his niece M. O. and the issue of her body, lawfully to be begotten, as tenants in common if more than one; but in default of such issue, or being such, if they should all die under the age of 21, and without leaving lawful issue of any of their bodies, then over.

Doe v. Elvey, 4 East, 313. Doe v. Goff, 11 East, 668.

The Court of K. B. held, that the niece only took an estate for life.

What words create a Term for Years. Tit. 8. c. 2. § 27.

43. An estate may be devised to a person for a term for years, as well as for any freehold estate; and it has been stated in a former title to have been held, that a devise of lands to a person and the heirs of his body for 500 years, would determine by the death of the devisee without issue; but that this doctrine had been altered, and it was settled that such a term would continue for the 500 years, and vest in the executors of the devisee.

Tit. 8. c. 1. § 7.

44. It has also been stated, that a devise to executors for payment of debts creates an estate for years; and also a devise till such time as a particular sum shall be raised out of the rents and profits of the lands devised.

45. With respect to uncertain interests, if a man devises lands to his wife till his son comes of age, to provide his children with necessaries, this interest does not determine by the death of the wife, but goes to her executors. And uncertain Interests. Smith v. Havens, Cro.Eliz.252.

46. If the devise had been that his lands should descend to his son, but that his wife should have the full profits till his son came of age, for his maintenance; here nothing being given to the wife but a mere confidence, her interest would determine with her death. An. 2 Leon. 221.

47. In a case which has been already stated, it was resolved that the wife's estate determined by the death of the son. Mansfield v. Dugard, Tit. 16. c. 1. § 84.

TITLE XXXVIII.

DEVISE.

CHAP. XIV.

Construction—Of the Rule in Shelley's case.

1. *Applied in Devises of Legal Estates.*
7. *Though the Limitation to the Heirs be only mediate.*
10. *Though the Estate for Life arise by Implication.*
11. *Where the word Heir in the singular number is used.*
16. *Where there are superadded words to the word Heirs.*
21. *In Devises of Trust Estates.*
29. *In Devises of Copyholds.*
31. *In Devises of Terms for Years.*
32. *The Rule not applied where the Limitation is to Sons or Children.*
37. *Or to Heirs with Words of Explanation.*
41. *Or to the Heir with Words of Limitation.*
45. *Or to Heirs with Words limiting an Estate of a particular Nature.*
46. *Or to the Heir for Life.*
48. *Or to Issue with Words of Limitation.*
52. *Unless the general Intent require a different Construction.*
56. *Or where a Trust is created and a Conveyance directed.*
65. *Or where the Estates are of different Natures.*
69. *Case of Perrin v. Blake.*
71. *General Observations on the Rule.*

Section 1.

Applied in Devises of Legal Estates. Tit. 32. c. 22.

THE rule laid down in Shelley's case, of the origin and nature of which an account has been already given, having been established for purposes of general utility, has been adopted in the construction of devises, as well as in that of deeds. But it being a principle of law that the intention of the testator is to be the chief guide in the expounding of devises, it has been often doubted how far the application of

this rule should be extended, in contradiction to the particular intention of the testator.

It has, however, been uniformly determined, in all cases of devises of legal estates, that wherever lands are given to a person for life, or for any greater estate, with an immediate remainder to the heirs, or heirs of the body of such devisee, the word heirs, or heirs of the body, shall operate as words of limitation, and give the devisee an estate in fee, or in tail.

2. A person devised lands to his son John, to hold to the said John for life, and after his decease, then to the use and behoof of the heirs male of his body; and for default of such issue, to his son Robert and the heirs male of his body. Rundale v. Eeley, Cart. 170.

It was resolved that the first words created an estate tail, as well in a will, as in any other conveyance. The estates could not stand together, but the estate for life was swallowed up in the estate tail.

3. Although it should appear from other circumstances, besides an express devise for life, that the testator did not intend to give the first devisee a greater estate, such as a power to settle a jointure, with the concurrence of trustees; or an interposed estate to trustees to preserve contingent remainders; or a clause that the devisor's estate should be without impeachment of waste; yet the courts have applied the rule, and given the devisee an estate of inheritance.

4. A person devised lands to trustees and their heirs, to the intent and purpose that they should permit and suffer A. to receive and take the rents and profits for and during the term of his natural life; and after his decease should stand seised of the same lands to the use of the heirs of the body of A.; Broughton v. Langley, 2 Ld. Raym. 273. Tit. 12. c. 1. § 14. S.C.

with a proviso that the trustees and A. might make a jointure for his wife.

It was determined that A. took an estate tail.

Papillon v. Voice, 2 P. Wms. 471.

5. Lands were devised to B. for life, without impeachment of waste, remainder to trustees and their heirs during the life of B. to support contingent remainders, remainder to the heirs of the body of B., remainder over.

Sir J. Jekyll was of opinion that an estate for life only passed to B., with remainder to the heirs of his body, by purchase. But upon an appeal to Lord King, he said the remainder to the heirs of the body of B. was within the general rule, and must operate as words of limitation, and consequently create a vested estate tail in B.; and that the breaking into this rule would occasion the utmost uncertainty.

Sayer v. Masterman, Amb. 344.

6. A person devised in these words,—"I give to my loving brother G. S. and the heirs of his body, the males having preference, and succeeding according to their births; and to preserve contingent remainders from being barred during the life of the said G. S., I give the said estates and farms to my friend Doctor R.; and on failure of issue of the said G. S., I give the said estates and farms to my niece." The cause came on to be heard before Lord Hardwicke, who directed a case to be made for the opinion of the Judges of the K. B. Afterwards, upon his resigning the great seal, Lords Commissioners Willes, Smythe, and Wilmot succeeding to it, application was made to them to hear the cause, which they consented to do, considering themselves as judges at law, though sitting in a court of equity.

Lord Commissioner Wilmot said, the reason of the rule in Shelley's case, that where one takes an estate of freehold, and after an estate is limited to the heirs

male of his body, the heirs male must take by descent, and not by purchase, was to secure to the lord his fruits on descent, and had long since ceased. But it had been better if that rule had never been broke in upon. He was not for breaking in upon it farther. He could not find any case where the words, heirs of the body, in the plural number, and no words superadded, had been considered as words of purchase, and referred to Lord King's opinion in Papillon v. Voice, that the limitation to trustees did not control the estate tail.

The Court declared that G. S. was entitled to an estate tail.

Though the Limitation to the Heirs be only mediate.

7. Where the remainder to the heirs, or heirs of the body, of the devisee for life, is only mediate, by the interposition of some other estate, the devisee will take an estate in fee, or in tail, in remainder; to take effect in possession, upon the determination of the interposed estate; and the estate for life is not merged in the remainder.

Coulson v. Coulson, 2 Atk. 247.

8. R. Bromley being entitled to a reversion in fee in certain lands, expectant upon the death of Elizabeth Foster, devised the same to Robert Coulson for life, remainder to trustees during his life, to preserve contingent remainders, remainder to the heirs of the body of the said Robert Coulson, remainder over.

The question was, what estate Robert Coulson took under this devise; and the case having been sent by the Chancellor (Lord Hardwicke) to the Court of K. B., the Judges of that Court sent the following certificate:—"We have heard counsel in the question referred by your Lordship to us; and as it appears by the state of the case, there is, after the determination of the estate for life of Robert Coulson,

a devise to J. B. and R. R. and their heirs, for and during the life of Robert Coulson, we are of opinion that by reason of the remainder interposing between the devise to Robert for life, and the subsequent limitation to the heirs of his body, the said Robert took an estate for life, not merged by the devise to the heirs of his body; but by that devise an estate tail in remainder vested in the said Robert."

MSS. Rep. Against this certificate the counsel cited 2 Roll. Ab. 418. pl. 4 & 5., to prove the remainder to the heirs of the body contingent. But after looking into the book, Lord Hardwicke paid no regard to it; and decreed according to the opinion of the Judges.

ante, c. 8. § 26. 9. In the case of Hodgson v. Ambrose, which has been already stated, there was a devise to Elizabeth Belchier and Catherine Jolland, in the same words as in the case of Coulson v. Coulson; a case was made for the opinion of the Court of K. B. upon the following question:—"Whether Catherine Belchier, the daughter of Elizabeth Belchier, took any, and what estate under the will of Susan Jolland; and, secondly, what estate Catherine Jolland took under the said will."

The Judges of the Court of King's Bench gave their opinion in the following words: "As to the question whether Elizabeth would have taken an estate tail, whatever our opinions might be if the case were new, we think, as the case of Coulson v. Coulson is literally the same, the precise question ought not to be again litigated; and by that authority we are bound to say, in the words of the certificate in that case, that as it appears by the state of the case that there is, after the determination of the estate for life to Elizabeth Belchier, a devise to W. A. and J. P. and their heirs, for and during the

life of Elizabeth Belchier, we are of opinion that Elizabeth Belchier, if she had survived the testatrix, would have taken an estate for life in the premises devised to her, not merged by the devise to the heirs of her body; but by that devise an estate tail in remainder would have vested in the said Elizabeth; and that Catherine Jolland took an estate for life in all the devised premises, not merged by the devise to the heirs of her body; but by that devise an estate tail in remainder vested in the said Catherine Jolland."

The Court having decreed in conformity to this certificate, an appeal was brought in the House of Lords, where the following question was put to the Judges: "What estate Catherine Hodgson took under the will?" And the Lord Ch. Baron of the Exchequer having delivered the unanimous opinion of the Judges present, "That Catherine Hodgson took an estate for life in all the premises, not merged by the devise to the heirs of her body; and that by that devise an estate tail in remainder vested in the said Catherine;" it was ordered and decreed, that the appeal should be dismissed and the decree affirmed.

10. Though no estate for life be expressly devised, but only arises from a necessary implication, yet the rule will be applied.

Though the Estate for Life arise by Implication.

11. I. Foorde made his will, having then two sons, Rawlinson and William, and a brother Nicholas, who had then also two sons, James and Nicholas, and gave his real estate to his eldest son Rawlinson at his age of twenty-three, to enjoy the whole during his life. "And the whole estate, of which he is only tenant for life, shall after his decease go to his eldest son that shall be then living; and if he dies without any son or sons to enjoy it during their lives (of which none

Hayes v. Foorde, 2 Black. R. 698.

are or shall be tenants but while they live to enjoy it), that then it shall come to his brother William Foorde during his life, and to any of his heirs males during their lives, and no longer; and if they die without issue male, then to the heirs male of my brother Nicholas Foorde's sons, and to any of their heirs male during their lives (of which none of them are tenants any longer, nor shall it be in any of their powers to sell, dispose, or make away any part or the whole of it); and in case they all die without heirs male, then it is to go to the next of kin of me."

At the same time, and with the same solemnities, the testator published a schedule referred to in the said will, and which the special verdict found to be part of his will, containing a very particular account of all his real and personal estate; the title to which schedule was in these words, "An account how I dispose of my estate to my son Rawlinson Foorde, as followeth:—He paying his mother out of my real estate the sum of 15*l.* per annum during her life, and 24*l.* per annum out of my mortgages, and then all to revert to my son Rawley Foorde, during his life; and after his death to his sons; and for want of sons, to his brother William Foorde, during his life, and afterwards to William Foorde's eldest son; and for want of his having sons, to my brother Nicholas Foorde's sons, and for want of any eldest sons, to my sons' daughters, and so to the next of kin."

Rawlinson and William, the two sons of the testator, died without issue male; James the eldest nephew died before William the son; and upon William's death, the youngest nephew entered, and suffered a recovery. The question was, whether Nicholas the nephew took an estate for life, or in tail, under the will and schedule.

The Court of K. B. in Ireland was of opinion that he took only an estate for life.

Upon a writ of error to the Court of K. B. in England, Lord Mansfield delivered the opinion of the Court, that the only doubt was, whether by the words of the will, Nicholas, the nephew of the testator, took any estate by implication. That this doubt was removed by the schedule, which expressly gave an estate to the sons of his brother Nicholas Foorde; that therefore Nicholas the nephew took an estate for life by implication, thus explained, which being conjoined to the estate expressly given to his heirs males, would, by the known rules of law, give him an estate in tail male. Judgment was given accordingly.

Where the word Heir in the singular number is used.

11. Although the limitation be to the heir, in the singular number, yet the rule will be applied; and the devise will be construed an estate tail.

Burley's Case, 1 Vent. 230.

12. Thus, Lord Hale says, it was adjudged in 43 Eliz. that a devise to A. for life, remainder to the next heir male, and for default of such heir male, then to remain over, was an estate tail.

Wilkins v. Whiting, 1 Roll. Ab. 836. Bulst. 219. 2 Vern. 324.

13. A person devised lands to his youngest son for ever, and after his death, to the heir male of his body for ever; and for default of such heir male, to E. his eldest son for ever. It was resolved, that the youngest son took an estate tail.

Miller v. Seagrave, Rob. Gav. 96.

14. In a case cited by Mr. Robinson in his Custom of Gavelkind, there was a devise to Serjeant Miller and his wife for their lives, remainder to the next heir male of their two bodies. It was held that this was a devise in tail: for a devise to the heir male was a devise in tail, unless there were words of limitation superadded, so as to bring it within the

infra, § 43.

reason of Archer's case. But the words, first, next, or eldest, or any like words superadded, made no difference.

Dubber v. Trollop, Amb. 453. Cases temp. Hardwicke, 160.

15. Sir T. Trollop devised the manor of A. to his first son William for life, remainder to the heirs male of his body, remainder to his second son Thomas for life, and after his death to the first heir male of his body.

The Court held that the words heir male were to be understood collectively, and that Thomas took an estate tail; it appearing that such was the testator's intention by the other devises. That this stood distinguished from Archer's case, no limitation being superadded to the words first heir male; and the word *first* should be understood first in order of succession, from time to time.

infra, § 43.

Where there are superadded Words to the word Heirs.

16. A devise to the heirs, or heirs of the body of a prior devisee for life, with superadded words of limitation, will be construed within the rule in Shelley's case, so as to create an estate in fee or in tail.

Goodright v. Pullyn, 2 Ld. Raym. 1437. 2 Stra. 729.

17. A person devised to Nicholas Lisle for his life, and after the decease of the said Nicholas, he devised the same unto the heirs males of the body of the said Nicholas, lawfully to be begotten, and his heirs for ever; but if the said Nicholas should happen to die without such heir male, then he devised over.

The Judges were all of opinion that this was an estate tail in Nicholas. They held, that *if* the subsequent words relied on, as *his*, and *if he died without such heir male*, were not sufficient to restrain and alter the operation of the words, *heirs males*, and so qualify them as to make them a description of the person; and that the operation of plain and clear

words, and a settled rule of law, should not be defeated or broken into by uncertain or doubtful words, which they took the last at least to be.

18. The following case was sent by the Lord Keeper to the Court of C. B. for its opinion.

G. Legate devised his lands, in default of issue of his own body, to his nephew William Legate, for and during the term of his natural life, and after his decease, to the heirs male of the body of his said nephew lawfully to be begotten, and the heirs male of the body of every such heir male, severally and successively, as they should be in priority of birth; and for want of such issue, to his brother, &c. The question was, whether William Legate the nephew had an estate tail vested in him, or an estate for life only. Legate v. Sewell, 1 P. Wms. 87.

Three of the Judges were of opinion that William Legate had an estate tail vested in him, and Mr. Justice Tracey certified that he had only an estate for life.

Mr. Peere Williams says, the Court appearing not to be satisfied with the certificate of the three judges, directed an ejectment to be brought in B. R. in order to have the matter settled: but it was said the parties agreed, and so the question was not determined. Yet in 2 Vesey, 657, Lord Hardwicke says, Lord Cowper held himself bound to agree with the three Judges, and so decreed.

19. Thomas Wardell devised thus,—"I give and bequeath unto my daughter Lucretia all my plantations, together with the negroes, &c., during the natural life of my said daughter. *Item*, I bequeath to the heirs of the body of my said daughter Lucretia, begotten or to be begotten, and to his or her heirs for ever, after my said daughter's decease, all my Morris v. Ward, cited 8 Term R. 518.

before-mentioned plantations, &c. But for want of such heirs of the body of my said daughter, I also give and bequeath the aforesaid premises, after the decease of my said daughter, to my own next heirs, and their heirs for ever."

This case came on before the Privy Council upon an appeal from Barbadoes, and the following reasons were used in the printed case.

"It is a general rule of law, that when an estate is limited to one for life, a limitation afterwards to the heirs of the body of that same person creates an estate tail. And though this be in the case of a will, there is no reason to depart from that rule; for if Lucretia were construed to have an estate for life only, then the remainder to the heirs of her body would be words of purchase; and then, though she had several sons, yet the eldest only would have been heir, and the younger sons would never have taken under that limitation, though it was clearly the testator's intention that all her sons should take, by using the word *heirs*, in the plural number. And the subsequent clause,—'for want of such heirs of the body of my said daughter, to my own next heirs, and their heirs for ever,' is a further explanation of his meaning, that his daughter should take an estate tail, with a remainder to his own right heirs. Signed N. Fazakerley. D. Ryder."

This case was heard before the Privy Council in 1730, when it was ruled that Lucretia took an estate tail. The Chief Justices Raymond and Eyre assisted at the decision. And Lord Kenyon has said, that though the above were only the reasons of the counsel in that case, they contained as much good sense and sound law as if they had the authority of all the Judges of England.

20. There are, however, some cases in which superadded words of limitation may control the word heirs, so as to render them words of purchase; of which an account will be given hereafter.

21. In devises of mere trust estates, where no conveyance is directed, the construction is the same in the Court of Chancery, as it would be in a court of common law upon a devise of a legal estate; so that the rule in Shelley's case is there applied to the construction of devises, as well as at law.

In Devises of Trust Estates. Sweetaple v. Bindon, Tit. 5. c. 2. § 14.

22. One devised lands to four persons and their heirs, for payment of debts, and afterwards to the use of them and their heirs. After which, by a codicil, he devised that his will should stand, saving that when his debts were paid, A., who was one of the four devisees in the will, should have his share of the lands to himself for life, with a power to make leases for 99 years determinable on three lives, remainder to the heirs male of his body, remainder over.

Bale v. Coleman, 1 P. Wms. 142.

Lord Cowper was of opinion that A. ought to be tenant for life only, with remainder to his first and other sons in tail male. But the case coming on before Lord Harcourt, on a rehearing, he said—"This being the case of a will differs from the several cases that have been cited of marriage articles, in the nature of which the issue are particularly considered, and looked upon as purchasers; and for which reason the Court has restrained the general expressions made use of by the parties; for it cannot reasonably be supposed that a valuable consideration would be given for the settlement of an estate, which, as soon as settled, the husband might destroy. But no case has been cited where upon the words of a will, or the parties claim voluntarily, the like decree has

vide infra.

been made. In all such cases the testator's intent must be presumed to be consistent with the rules of law; and at law these words would certainly create an entail. Neither can it be inferred with any certainty, from the power of leasing given by the testator, that no estate tail was intended; in regard such power of leasing is more beneficial than that given to tenant in tail by statute. And as the debts are admitted by the pleadings to be all paid, the same construction is now to be made, as if there had been originally no trust. So decree A.'s share or fourth part to be conveyed to him and the heirs male of his body, remainder over, &c."

23. The doctrine laid down in the preceding case, was contradicted by Lord Hardwicke in the following one. A person devised an estate to trustees, their heirs and assigns, in trust that they and their heirs should in the first place, by the rents and profits, or by sale or mortgage of the premises, raise so much as should be necessary for the payment of his debts; and after payment thereof gave the same unto his trustees for 500 years, without impeachment of waste, upon trust as after mentioned; and then went on in these words,—"And from and after the determination of the said estate for years, then I give and devise all my said lands, &c. unto my said trustees, their heirs and assigns, my mind being that my said trustees shall be and stand seised of the said premises in trust to the several uses, behoofs, intents, and purposes after declared; viz. as for one moiety of the same premises, I give and devise the same to the use and behoof of my nephew Thomas Bagshaw, for the term of his natural life, without impeachment of waste; and from and after the determination of that estate, to my said trustees and their heirs, for

Bagshaw v. Spencer, Collect. Jur. vol. 1. 378.

and during the life of the said Thomas Bagshaw, to preserve and support the contingent uses and remainders herein-after limited, but to permit the said Thomas Bagshaw to receive the rents and profits during his natural life; and after his decease, then to the use and behoof of the heirs of the body of the said Thomas;" and for want of such issue, then to Benjamin Bagshaw in the same manner.

Lord Hardwicke held that Benjamin Bagshaw took an estate for life only; for if a conveyance had been prayed, there must have been a limitation to trustees to preserve contingent remainders, and then the next limitation must have been to the first and other sons of Benjamin Bagshaw; for there were no contingent uses or remainders, unless the limitations to the heirs of the body of B. Bagshaw were allowed to be such.

The preceding case is not now held to be any authority, as it has been contradicted by Lord Keeper Henley in a case which will be stated hereafter; and also by a determination of Lord Thurlow. Fearne Cont. Rem. 195.

24. Sir Edward Turner devised all his real estate to C. B., in trust to pay the rents to Sarah Garth for her life, and after her death, to pay the same to Edward Turner Garth her son for life, and afterwards to pay the same to the heirs of his body. Garth v. Baldwin, 2 Ves. 646.

Lord Hardwicke said, that upon the true construction of this will, he was obliged by the rules of law and equity to direct the conveyance to be to the son in tail: because in limitations of a trust, either of real or personal estate, to be determined in the Court of Chancery, the construction ought to be made according to the construction of limitations of a legal estate; with this distinction, unless the intent of the testator, or author of the trust, plainly appears to

the contrary. But if the intent does not plainly appear to contradict and over-rule the legal construction of the limitation, it was never laid down, nor was it by him in the case of Bagshaw v. Spencer, that the legal construction should be over-ruled by any thing but the plain intent. That he was not in a court of equity to over-rule the legal construction of the limitation, unless the intent of the testator, or author of the trust, appeared by declaration plain; that is, not saying it in so many words, but plain expression, or necessary implication of his intent; which was the same thing.

Wright v. Pearson, Amb. 358. Fearne, Cont. Rem. 187.

25. Henry Rayney having five grand-children, devised all his freehold estates to trustees and their heirs, in trust to raise a sum of money for his grand-children; and subject thereto, to the use of his nephew T. Rayney and his assigns for his life, remainder to trustees to preserve contingent remainders, remainder to the use of the heirs male of the said T. Rayney begotten, and their heirs; provided that in case the said T. Rayney should die without leaving any issue male of his body living at his death, then and in such case he subjected the premises to the payment of 100*l.* a piece to his two nieces; and for default of such issue male of his said nephew T. Rayney, then, as to all the premises, to his five grand-children, or such as should be living at the time of the failure of issue male of the said T. Rayney, their heirs and assigns: provided that the said T. Rayney should be put out apprentice to a surgeon, or sent to Cambridge; and in case he should refuse to be an apprentice, or to go to Cambridge, then his will was that the estate so before limited to the said T. Rayney for his life, should cease and determine, and be void, as if he had been dead; and that

the said premises so limited to the said Thomas for his life, and his issue male as aforesaid, should from thenceforth revert over and go to such of his grand-children as should be living, and to their heirs.

T. Rayney died without issue, having suffered a recovery of the premises; and the question was, whether he took an estate tail, or an estate for life.

Lord Keeper Henley said, first, that the estate was a fee in the trustees, and not executed by the statute of uses in any of the subsequent limitations. But he thought that was not very material in the principal case, as by the will the trusts were fully limited and declared. For he thought it very dangerous that a different construction should be put upon words of limitation in cases of trusts and legal estates, except where the limitations were imperfect, and something seemed left to be done by the trustees in the first place; and consequently secondarily by the Court of Chancery.

The second question was, whether the heirs male of Thomas Rayney took a fee as purchasers, or in tail, under the limitation to the father. He thought that T. Rayney took an estate tail, from the apparent intent of the testator, who plainly intended that the heirs male, &c. should not take an estate in fee, which they must, if they took as purchasers. He was considering, he said, whether he could not make this construction, viz. to Thomas for life, then to his heirs male in tail, then to the grand-children. And if the limitation had been, for default of such heirs of the body, he might have considered it as heirs of the body of the heirs male, &c. mentioned before. But the limitation there was, for default of such issue male, &c. He thought the words, *and*

their heirs, in the will, were redundant and surplusage; and that Thomas Rayney took an estate tail; and consequently that the recovery suffered by him was good. And though it was a rule never to reject words in a will, if they could stand, yet he must do it in this case, to support the testator's intent.

He said, that in the case of Bagshaw v. Spencer, which was a case of a trust, as the principal one was, Lord Hardwicke did upon that ground, and the limitation of the other moiety of the estate to the Spencers, and other circumstances in the case, which showed the intent of the testator plain and clear, construe it to be only an estate for life in Bagshaw; contrary to the former determinations. He did it on the plain intent of the testator, and in so doing assumed no more power than every court of law had.

Austen v. Taylor, Amb. 376.

26. John Holman gave all his estate to trustees and their heirs, to the uses, trusts, and purposes therein mentioned; first, to the intent that his sisters should receive an annuity for their lives, and subject thereto, in trust for the plaintiff for life, remainder to trustees to preserve contingent remainders, remainder to the heirs of the body of the plaintiff, remainder to his own right heirs. He also gave the residue of his personal estate to trustees, in trust to buy lands in fee, which he directed should remain, continue, and be, to, for, and upon such and the like estate and estates, trusts, intents and purposes, as were by him before devised, limited, or declared of and concerning his lands and premises therein-before devised, or as near thereto as might be, and the deaths of persons would admit.

Upon a bill to have the residue laid out according to the will, the question was, whether the plaintiff was entitled to an estate for life, or in tail, in the lands to be purchased.

Lord Keeper Henley said, nothing was left to the trustees to be done, but to buy the land; the testator had declared the uses of the land, when purchased: he did not believe the testator intended the trustees should make a conveyance; there was no necessity for it. It was said, if the words in the former limitation had been again repeated, it would have been the very case of Papillon v. Voice; but he thought otherwise. There was a direction to the trustees in that case to convey, but there was no direction here. The true guide was this, where the assistance of trustees, which was ultimately the assistance of the Court of Chancery, was prayed in aid, to complete a limitation, in that case the limitation in the will not being complete, it was a sufficient declaration of the testator's intention that the Court should model the limitations; but where the trusts and limitations were expressly declared, the Court had no authority to interfere, and make them different from what they would be at law. infra.

Decreed that the plaintiff was entitled to an estate tail.

27. Sir William Morgan devised an estate to trustees, to raise money in aid of his personal estate, for the payment of his debts; and after payment thereof, then to stand seised to the use of his son William, for and during the term of his natural life, without impeachment of waste; and from and after his decease, to the use and behoof of the heirs male of the body of his said son William, lawfully to be begotten, severally, respectively, and in remainder, one after Jones v. Morgan, 1 Bro. Rep. 206.

another, as they and every of them should be in priority of birth and seniority of age; and for default of such issue, to any after-born son he might have; with a power, while in possession, of leasing, making a jointure, and raising portions for younger children.

The question was, whether William the son took an estate in tail or for life only.

Lord Thurlow said, he could not distinguish this case from that of Wright v. Pearson, with which the case of Bagshaw v. Spencer could not stand. It had been contended, that however it might be at law, it should be construed otherwise in equity, for that the whole fee was given to the trustees, as it might be necessary for the payment of the debts; but after payment of the debts the testator did not mean to leave any thing executory; no, the trustees were to stand seised to the subsequent uses. If this was not a legal estate, it was only not so because the first use might absorb the whole estate; then the only question was, whether, under the cases decided, he must consider this point as being different in the case of legal and equitable estates. In Garth v. Baldwin the construction restored the law, that trusts were to be considered in the same manner as legal estates; if that were so, there could not be a more proper case to apply the rule than this, as there could be nothing so near a legal estate as the present: he thought therefore the same rule of construction must apply to equity, as at law; and decreed that William took an estate tail.

28. Where the Court of Chancery is called upon to direct a conveyance to be made under a will, the construction has been different; of which an account will be given hereafter.

29. The rule in Shelley's case has been applied in the construction of devises of copyholds. As where a person, who had surrendered a copyhold to the use of his will, devised it to B. for life, and after his death to the heir of his body begotten. It was held that the word heir, being *nomen collectivum*, was equivalent to the word heirs, in the plural number; and so B. took a fee executed; and his heir should have it by descent, and not by purchase. And Lord C. B. Gilbert has observed on this case, that it must have been meant of a fee tail, because the heirs were restrained to the body of B.

In Devises of Copyholds.

Lawsey v. Lowdell, 2 Roll. Ab. 253 pl. 4.

Ten. 270.

30. In ejectment Lord Ch. J. Pratt ruled this case: A. surrendered a copyhold estate to the use of his will, and then devised it to B. for life, and after his decease to the heirs of his body. B. died in the life-time of the testator. It was held that his heir could take nothing; for it was a devise in tail to B.; the words, heirs of his body, being words of limitation.

Busby v. Greenslate, 1 Stra. 445.

31. The rule in Shelley's case has also been applied in the construction of devises of terms for years; and therefore if a term be devised to A. for life, and afterwards to the heirs of his body, these words are generally construed to be words of limitation, and the whole vests in the first taker. But if there appears any other circumstance or clause in the will to show the intention that these words should be words of purchase, and not of limitation, then it seems the ancestor will take for life only, and his heir will take by purchase.

In Devises of Terms for Years.

Dod v. Dickinson, 8 Vin. Ab. 451. pl. 25.

Fearne, Ex. Dev. 300.

32. The rule in Shelley's case does not apply to the words sons or children; and therefore a devise to A. for life, with remainder to his sons or children, or to his first and other sons, or children, gives to A. an estate only for life.

The Rule not applied where the Limitation is to Sons or Children.

Tit. 32. c. 22. § 38.

1 Vent. 231.

33. Thus Lord Hale has cited a case stated in 1 Roll. Ab. 837. pl. 13, where a person devised to his eldest son for life, *et non aliter*; and after his decease to the sons of his body: it was held to be an estate for life only in the son. And the usual mode of creating a strict settlement by will is, to devise to the eldest son for life, with remainder to his first and other sons severally and successively, and to the heirs male of the bodies of such first and other sons; remainder to the other sons of the testator in the same manner.

Ginger v. White, Willes, 348.

34. A person devised his estate to his son for life, and after his decease to the male children of the said son, successively one after another as they were in priority of age, and to their heirs; and in default of such male children, he gave the same to the female children of the said son, and their heirs; and in case the said son should die without issue, then he devised the premises to his grandson in fee.

It was resolved, 1st. That the devisee did not take an immediate estate tail by the devise to his male and female children; and 2d. That under the words, "in case the said son should die without issue," he did not take an estate tail by implication in remainder, after the limitation to his children.

ante, c. 12.

Goodtitle v. Wodhull, Willes, 592.

35. A will was made in these words: "My will is that my son shall have and enjoy the manor of B. only for his life, and then the premises shall descend and come to his male children, if he have any, for their natural lives only, and to the male children descending from them."

It was resolved that the son took an estate for life only.

Goodright v. Dunham, Doug. 264.

36. A person devised a house to his son for his life, and after his death unto all and every his chil-

dren equally, and to their heirs; and in case he died without issue he gave the premises to his daughters.

It was admitted that the son took an estate for life only.

Or to Heirs with Words of Explanation.

37. Where an estate is devised to a person for life, with remainder to his heirs, or the heirs of his body, and there are words of explanation annexed to the word heirs, from whence it may be collected that the testator meant to qualify the meaning of the word heirs, and not to use it in its technical sense, but as a description of the person or persons to whom he intended to give his estate, after the death of the first devisee; the word heirs will in that case operate as a word of purchase.

Goodtitle v. Herring, 1 East, 264.

38. A person devised to trustees, to the use of and in trust for her sister Margaret Davie and her assigns, during her natural life, without impeachment of waste, remainder to the same trustees to preserve contingent remainders; and from and after her decease, then to the use of and in trust for the heirs male of the body of the said Margaret to be begotten, severally, successively, and in remainder one after another as they and any of them should be in seniority of age and priority of birth, the elder of such sons, and the heirs male of his body lawfully issuing, being always preferred and to take before the younger of such son and sons, and the heirs male of his and their body and bodies; and for want and in default of such issue, then to the use of and in trust for all and every the daughter and daughters of the body of the said Margaret to be begotten, to be equally divided amongst them, if more than one, share and share alike, to take as tenants in common and not as joint tenants, and of the several and respective heirs of the body and bodies of such

daughter and daughters; and in default of such issue, remainder over.

Lord Kenyon said he had not the smallest doubt upon the case. The intention was most obvious to give the first taker only an estate for life; but if that intention could not be carried into effect, without shaking a positive rule of law, he should certainly bow to the decisions. The case of Coulson v. Coulson went on the same ground, and so afterwards did Perrin v. Blake in the Exchequer Chamber, where the Judges thought, that after the rule of law in Shelley's case had governed so many subsequent decisions, however imperfect in itself as a rule for construing the intention of a testator, it was necessary to abide by it. That rule, however, was only established to the extent in which it was to be found in Shelley's case, to this effect, that if an estate of freehold be given to a man, and either mediately or immediately, in any part of the same instrument, an estate was limited to the heirs of his body, the latter limitation would unite with the former, and give him an estate tail. But it never had been decided that those words might not be otherwise explained in the will by the testator himself. They were so explained in Lowe v. Davis. The estate which was the subject of dispute in that case, came afterwards to a gentleman who was not perfectly satisfied with the decision, and would have canvassed it again. His doubts were founded upon an old opinion which he had discovered of Lord Holt's, that the words, heirs of the body, were so positive to give an estate tail to the first taker, that they could not be gotten rid off by subsequent words. That opinion he had seen, but it was certainly too strait-laced a construction, and nobody had ever doubted but that the case of Lowe v.

ante, § 8.

infra.

1 Rep. 104 *b.*

ante, c. 13. § 40.

Davis was rightly decided. That case however, if it wanted confirmation, had been fortified by the subsequent determination in Doe v. Laming; the Court there clearly thought that the subsequent words, as well females as males, showed that the testator meant the words, heirs of the body, &c. to be words of description of the persons whom he intended should next take, and not to be words of limitation; and therefore in this case Margaret took only an estate for life. Idem, § 41.

Mr. Justice Lawrence said, the question was, whether the words, heirs male of the body of Margaret, were descriptive of the persons whom the testatrix afterwards called son or sons; for of the intention there could be no doubt. She first gave Margaret an express estate for life, without impeachment of waste, then to trustees to preserve contingent remainders, then, after Margaret's decease, to the heirs male of her body to be begotten, severally, successively, and in remainder one after another, &c. All this was unnecessary if the testatrix meant to give Margaret an estate tail; but then she went on,— "the elder of such sons and the heirs male of his body to be preferred before the younger of such son and sons;" evidently meaning the same persons whom she had before described as heirs male of the body of Margaret: therefore this fell directly within the case of Lowe v. Davis, and was the same as if the testatrix had said, by heirs male of the body I mean the eldest son and other son and sons of Margaret; and if she had said so in as many words, it could not be questioned, but that the former words must have had that construction put upon them: now the words made use of were in effect the same. Then the testatrix proceeded to give an estate to the daughters

of Margaret in the same manner ... that devise first by the words, such son or sons, the same persons whom she had before described as heirs male of Margaret: for she first provided the sons, and then for the daughters of the elder. It was an answer to say that by construction, if the eldest son of Margaret had died in the lifetime of the testatrix, leaving a son, the devise would have lapsed and the grandson have inherited; for if the obvious meaning of the words that Margaret should enjoy [illegible] life, they ought not enlarge that estate, in order to prevent [illegible] inconvenience.

Fearne Cont. Rem. 134.

Judgment was given that Margaret took only an estate for life. And upon a writ of error from this judgment to the House of Lords, the following question was put to the Judges:—What estate Margaret Davie took? The Lord Ch. B. delivered the unanimous opinion, that Margaret Davie took an estate for life. Whereupon the judgment was affirmed.

39. In a subsequent case, which is nearly similar to the last one, the Court of Common Pleas did not think it could restrain the legal effect of the words heirs *of* the body, so as to convert them into words of purchase.

Poole v. Poole, 2 Hen. & Pul. 491.

40. Lands were devised to trustees and their heirs to the use of them and their heirs, in trust for the use and benefit of the testator's first son during his life, and also upon trust to preserve the contingent remainders from being defeated or destroyed; and after his decease to the several heirs male of such first son lawfully issuing, so as the elder of such son and the heirs male of his body should always be preferred and take before the younger, and the heirs

...le of his body; and for want of such issue, in ...st for his second, third, fourth, and all and every ...her son and sons, for their respective lives, with ...mainders as before; and for want of such issue, in ...st for his first daughter, and every other his ...ughter and daughters, for their several and respec... lives; and also upon trust to preserve the contin... remainders from being defeated and destroyed; ...d from and after their several deceases, in trust ... the several heirs male of their several and respec... bodies lawfully issuing, so as the elder of such ...ughters and the several heirs male of her body should always be preferred and take before the younger of the same daughters, and the heirs male of her and their bodies: with power to the persons who should be entitled to the possession of his said estates to settle jointures.

The testator died leaving a son, and the question upon a case sent out of Chancery to the Court of C. B., was, what estate that son took under the will.

The Judges of the Court of Common Pleas certified to the Lord Chancellor, that if the devises contained in the will, to the children of the testator and their issue, had been devises of legal estates, the only son of the testator would have taken an estate in tail male; there not appearing upon the whole will together sufficient indication of the testator's intention to restrain the legal effect of the words, heirs male of the body, and to convert them into words of purchase.

41. Where words of limitation are superadded to the word *heir* in the singular number, from which it appears to have been the intention of the testator to denote by the word *heir* a new stock and root of in-

Or to the Heir with Words of Limitation.

of Margaret in the same manner; that also showed that by the words, such son or sons, she meant the same persons whom she had before described as the heirs male of Margaret; for she first provided for the sons, and then for the daughters of the first taker. It was no answer to say that by this construction, if the eldest son of Margaret had died in the lifetime of the testatrix, leaving a son, the devise would have lapsed, and the grandson been disinherited; for if the obvious meaning of the will was that Margaret should only take for life, they could not enlarge that estate, in order to prevent a possible inconvenience.

Printed Cases, 1801.

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male of his body; and for want of such issue, in trust for his second, third, fourth, and all and every other son and sons, for their respective lives, with remainders as before; and for want of such issue, in trust for his first daughter, and every other his daughter and daughters, for their several and respective lives; and also upon trust to preserve the contingent remainders from being defeated and destroyed; and from and after their several deceases, in trust for the several heirs male of their several and respective bodies lawfully issuing, so as the elder of such daughters and the several heirs male of her body should always be preferred and take before the younger of the same daughters, and the heirs male of her and their bodies: with power to the persons who should be entitled to the possession of his said estates to settle jointures.

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Tit. 32. c. 21. § 35.

heritance, it will be construed a word of purchase; and the first devisee will take only an estate for life.

Archer's case, 1 Rep. 66 *b.*

43. F. Archer devised lands to Robert Archer the father, for his life, and afterwards to the next heir male of Robert, and the heirs male of the body of such next heir male. It was agreed by Anderson Walmsley and the rest of the Court, that Robert had but an estate for life; because he had an express estate for life devised to him, and the remainder was limited to the next heir male of Robert, in the singular number.

Clarke v. Day, Moo. 593.

44. A man devised land to Rose his daughter for life, and if she married after his decease, and had issue of her body, then he willed that her heir after his daughter's death should have the land, and to the heirs of their bodies begotten.

It appears by the various reports of this case which are stated in 8 Viner's Ab. 213. pl. 4, that the Judges were much divided. Moor says, it was adjudged that Rose had only an estate for life, and the inheritance in her heir by purchase, resting in abeyance all her life, and settling in the instant of her death.

Poole v. Poole, 3 Bos. & P. 620. Amb. 459.

Or to Heirs with Words limiting an Estate of a particular nature. Cont. Rem. 286.

45. Mr. Fearne has observed, that there may possibly be some cases where the superadded words of limitation may be admitted to controul the preceding words heirs, heirs male, &c., though in the plural number, when such superadded words limit an estate to such heirs, heirs male, &c. of a different nature from that which the ancestor would take, if the preceding words heirs male, &c. in those cases, were taken as words of limitation. As in the case put by Anderson, of a limitation to the use of a man for life, and after his decease, to the use of his heirs,

1 Rep. 95 *b.*

and the heirs female of their bodies. Here the first word heirs would have given a fee to the ancestor, if taken as a word of limitation; whereas the subsequent words, and the heirs female of their bodies, grafted on the word heirs, could give only an estate tail female to the heirs. In such cases the general effect of the first words, heirs of the body, &c. seemed to be altered, abridged, and qualified by such subsequent express words of limitation, annexed to them, as could not possibly be satisfied by considering the first words as words of limitation. But he observes, we must take care to confine this observation to those cases where the ingrafted words describe an estate descendible in a different course, and to different persons, as special heirs, from what the first would carry the estate to; viz. to males instead of females, or *vice versa*; for where the first words give an estate tail general, and the words ingrafted thereon are words serving to limit the fee, it seems, by the general and better opinion, that the annexed words of limitation are not to be attended to; as in the cases of Goodright v. Pullyn, and those of Wright v. Pearson, and King v. Burchell, where the ingrafted words limited the whole fee. That there does not appear to be the same inconsistency in construing the first words, which describe heirs special, to be words of limitation, where the superadded words extend to heirs special; as there is where the first words, and those ingrafted on them, distinguish two different incompatible courses of descent, and would not carry the estate to the same persons. In the latter case it is absolutely impossible, by any implied qualification, to reconcile the superadded words to those preceding them, so as to satisfy both, by construing the first as words of limitation; whereas in

ante, § 17. Doe v. Ironmonger, ante, c. 10. § 35.

tator appeared, that the word issue should be *designatio personæ*, or whether he designed it to be a word of limitation; and they held that the testator designed it to be a description of the person, because he added a farther limitation to the issue, viz. and to the heirs of such issue for ever.

Boothby v. Vernon, Tit. 5. c. 2. § 19.

Backhouse v. Wells, 10 Mod. 181.

50. A will was made in these words,—"To the intent that all my lands should remain in my name and blood, I devise to J. S., my near kinsman, such and such lands, &c., to have and to hold for the term of his natural life only, without impeachment of waste; then to the issue male of his body lawfully to be begotten, if God shall bless him with such issue; remainder to the heirs male of the body of that issue."

Lord Ch. J. Parker delivered the opinion of the whole Court, that the devisee was made tenant for life, remainder to the issue in tail. The words of the will, he said, were so express to this purpose, that neither any words that could have been used, nor any arguments, could make it plainer; this he said was both the obvious and the legal sense of the words, and what they would have imported in a conveyance.

Vide Sparrow v. Shaw, ante, c. 12.

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51. J. Newson devised a moiety of certain lands, after the death of his wife, to his daughter Susan, during the term of her natural life, and after her decease, to the issue of her body lawfully begotten, and their heirs for ever. Susan had one daughter born before the will was made, and two born after.

Lord Kenyon said, that in a will, issue was either a word of purchase, or of limitation, as would best answer the intention of the devisor: though in the case of a deed, issue was universally taken as a word of purchase. Therefore, without disputing any of

the former cases, but on the contrary in confirmation of them all, and relying upon them for the foundation of this judgment, namely, that the intention of the devisor must prevail, he was of opinion that the devisor, in this case, used issue as a word of purchase, and consequently that Susan took only an estate for life, and her children took an estate in fee simple.

Judgment was given accordingly.

52. It has been stated in a former chapter, that where a testator appears to have a particular intent, and also a general manifest intent, both of which cannot by any mode of construction be carried into effect; the courts will construe the will in such a manner as to effectuate the general intent, though by that means the particular intent is defeated.

Unless the general Intent require a different Construction. ante, c. 12.

53. A person devised lands to A. for his natural life, and after his decease he gave the same to the issue of his body lawfully begotten, on a second wife; and for want of such issue, to B. and his heirs for ever. Provided that A. might make a jointure of all such premises to such second wife.

King v. Melling, 1 Vent. 225. 232. 2 Lev. 58. 2 P. Wms. 472.

Lord Hale was of opinion that this was an estate tail in A.; and though the three other Judges of the Court of K. B. were of a contrary opinion, yet upon error brought in the Exchequer Chamber, the judgment was reversed, and Lord Hale's opinion established.

54. John Blount devised a messuage and farm to his cousin John Harris, to hold during his natural life, and from and immediately after the determination of that estate, unto the issue male of the body of his said cousin John Harris, lawfully to be begotten, and to his and their heirs, share and share alike, if more than one; and for want of such issue, unto his

King v. Burchall, 4 Term R. 296. note.

cousin William King, his heirs and assigns for ever. And taking notice that he had covenanted to settle 50*l.* a year upon his wife, in part performance thereof, he devised houses at Maidstone to her, to hold for her life, as part of her jointure; and from and immediately after her death, he gave the same to his cousin James Harris, for and during the term of his natural life; and from and immediately after the determination of that estate, unto the issue male of the body of the said John Harris, lawfully to be begotten, and to his and their heirs; and for want of such issue, to his cousin William King and his heirs; with a proviso that if John Harris or his issue should alienate the premises, he should pay 2000*l.* to the person who ought next to take by virtue of the devises aforesaid.

Lord Henley.—The first question made by the plaintiff's counsel was, whether Harris took under the will an estate for life only, or an estate tail. And they founded their arguments of its being an estate for life, on the word issue being technically a word of purchase, and on the superadded words of limitation; and they compared this case to Loddington v. Kyme, amongst many other cases. The true answer is, that there can be no technical words in a will, but they are to be construed according to the intention of the parties. 2°. This case has no resemblance to Loddington v. Kyme: that was expressly upon two contingencies; to A. for life, and if A. have issue, then to such issue in fee; and if he die without issue then to B. in fee. There the Court construed the word issue to be *nomen singulare*; and were well warranted in so doing, by the intent of the party. But here it is and must be plural, and if the issue

ante, § 49.

were to take as purchasers, they must take as tenants in common; and put the case that J. Harris had ten sons, and the nine eldest died in his lifetime, leaving children, yet the tenth and only surviving son would carry away the whole inheritance. The testator intended the word issue to be a word of limitation in this case, and that W. King should take on failure of issue by J. Harris, whenever that should happen, and has carved the whole fee in particular estates, and remainders, for want of such issue, *i. e.* for default of such issue. There is something of peculiar force in this expression, and the law supposes that the inheritance already attached in the first taker, but liable to be defeated by a subsequent event, his dying without issue; and by no rule of law can it admit of that narrow rule of construction put on it by the plaintiff's counsel, viz. of being confined to issue living at J. Harris's death. They say, that if it be construed to be an estate tail in J. Harris, the superadded words of limitation to the word issue, must be rejected, as nugatory. I agree it is a sound rule in the construction of deeds and wills that every word ought to stand, if consistent with the manifest intention. Therefore in Backhouse v. Wells, the limitation being to A. for life only, and after his decease to his issue, if God should bless him with any; the Court, first on account of the negative word only, secondly because the word issue was so connected as to be construed *nomen singulare*, held it a word of purchase. So in Shaw v. Weigh, and the word heir in Maggot v. Sewell. But where there is an evident necessity to make it plural, there the same necessity requires that the superadded words of limitation should be rejected; and there is no case or authority to show that the word issue, or heirs, when

ante, § 50.

of Margaret in the same manner; that also showed that by the words, such son or sons, she meant the same persons whom she had before described as the heirs male of Margaret; for she first provided for the sons, and then for the daughters of the first taker. It was no answer to say that by this construction, if the eldest son of Margaret had died in the lifetime of the testatrix, leaving a son, the devise would have lapsed, and the grandson been disinherited; for if the obvious meaning of the will was that Margaret should only take for life, they could not enlarge that estate, in order to prevent a possible inconvenience.

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male of his body; and for want of such issue, in trust for his second, third, fourth, and all and every other son and sons, for their respective lives, with remainders as before; and for want of such issue, in trust for his first daughter, and every other his daughter and daughters, for their several and respective lives; and also upon trust to preserve the contingent remainders from being defeated and destroyed; and from and after their several deceases, in trust for the several heirs male of their several and respective bodies lawfully issuing, so as the elder of such daughters and the several heirs male of her body should always be preferred and take before the younger of the same daughters, and the heirs male of her and their bodies: with power to the persons who should be entitled to the possession of his said estates to settle jointures.

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plural, has been construed a word of purchase; but on the other hand there are authorities where the word heir in the singular number has been so; and so may the word issue, where the context requires it to be taken as a word of purchase. 4°. The testator, by the proviso in his will, has plainly declared his intention to give J. Harris an estate tail; "if J. Harris or any of his issue should alienate, &c." How could J. Harris alienate or incumber, if he had no estate of inheritance. The case of Wright v. Pearson, determined by me Trin. 31 Geo. II., has been attended to by the counsel in this case; and in my opinion, that was a much stronger case than the present. That was of a trust estate, and there were trustees interposed to preserve, &c.; and I was strongly pressed with the authority of Bagshaw v. Spencer; yet, after the best consideration I was able to give it, and after ransacking all the cases on the subject, I held it an estate tail. And an appeal was afterwards brought in the House of Lords against that decree, but was deserted by the appellant, on advising with his counsel. That determination, though a decree of my own, will have considerable weight with me; and I find, upon viewing my notes in that case, that the present has been argued upon the very same principles. I am therefore of opinion, for the reasons before mentioned, and from the authorities cited, that John Harris took an estate in tail male.

ante, 25.

Roe v. Grew, Wilm. 272. 2 Wils. R. 322.

55. Daniel Dodson devised in these words: I give unto my nephew George Grew all, &c. to hold for and during the term of his natural life, and from and after his decease, to the use of the issue male of his body lawfully begotten, and the heirs male of the body of such issue male; and for want of such issue male, he gave the premises to his nephew George Dodson, his heirs and assigns for

ever. George Grew had no child when the will was made. He entered on the premises upon the death of the testator, suffered a recovery, and died without issue male. And the question was, whether he took an estate tail, or for life only, under the will.

Lord Ch. J. Wilmot said, that though the testator certainly intended, in the first instance, to give George Grew only an estate for life, yet if he as certainly intended that all his sons should take in succession one after another (and they could not take in that manner but by lodging an estate tail in George Grew), then it came to this case—here were two things intended, one an estate for life to G. Grew, another an estate in succession to all his sons in tail male, *ad infinitum*. Could they both take place? If they could, they ought; if they could not, then balance the two intentions against one another, and see which was the weightiest and most comprehensive, and give that effect. Courts substitute themselves in the place of a testator, and suppose the question to have been asked him,—you have willed two things which cannot both be obeyed exactly, according to your will; and therefore one must yield to the other. What must have been the answer—I wish to be obliged in the principal, capital, and most material destination I have made, and to reject the secondary and subordinate one.

There were three points to be considered. 1°. If he intended a successive inheritance to all the issue male of G. Grew *ad infinitum*. 2°. Whether that intention could take place if G. Grew had only an estate for life. And 3°. If it could not, then which of the two intentions must govern the construction. That is, if the words *for life* must give place; or the words expressing an intention of giving a successive inheritance to the issue male of G. Grew.

As to the first point the will was clear; the remainder to Dodson was not to take place while any issue male of G. Grew existed; a general failure of that line was to open the succession to Dodson; and therefore a construction to let him in sooner, would directly encounter the manifest intention of the testator; who was making each of his nephews the distinct root of succession to particular parts of his estate.

It was objected that the word issue was only descriptive of an individual, and the words, of the body of such issue male, was in the singular number. Issue, in its natural or ordinary signification, meant all; it might be restrained. If first, next, or any other similar words had been used, he might have confined its general meaning; but as it stood in the will, it comprehended all. The word body in the singular number was not meant to point out one individual, viz. the first issue, and to exclude all the rest; but to limit the operation of the devise to one at a time, in a course of succession, and to exclude the issue from taking all together; which might have been more doubtful, if the word had been in the plural number, bodies; but without express words, the Court would not make an exposition productive of such absurd consequences. If only one son, it must be the first; the existence of a son for a moment determined the limitation; and if ten more sons had been born after, they could not take; but the remainder limited to G. Dodson was to fall into possession, in direct opposition to the will, which said it should take place for want of *such* issue male; *such*;—what? issue male of the body of G. Grew; comprising and embracing every branch arising from him; not one, but all the male line derived from him.

It was also objected that issue was more properly a word of purchase. It was used in the statute *de*

donis without an idea of purchase annexed to it, and it acts in a double capacity, as will best answer the intention: and though it was substituted in the place of the word heirs, which was scratched out, and it was fairly argued he might intend it as a word of purchase, yet it did not carry the argument a jot farther than the words, *for life*, did; for if they took by purchase, they must all take as joint tenants for life, and tenants in common of the inheritance: Could that be his intention? For if he had ten sons, and nine left issue, the tenth must have the whole estate by survivorship; and when all were dead, then the estate must break into ten parts, and there could be no cross remainders; so that when there was a failure of issue of one son, that part must go over to Dodson, when no part was intended to go to him whilst there was any issue male of the body of G. Grew. He intended all to take, but in course of succession. 2°. Could this intention take place if G. Grew took only an estate for life; it might, by construing the word issue to mean first and every other son in succession. Suppose he had said, I mean by issue, first and every other son, it must have been so expounded, because words were only pictures of ideas upon paper; and therefore if he put a meaning on the word himself, it must be understood as he meant it. But he had not said so, and therefore he left the word to act in its own natural character; and in that case, it would not endure to be expounded, first and every other son in succession; for, *ex vi termini*, it meant all, and had not an eye of successive priority in it; and there was no case where it was ever construed to mean, first and every other son in succession; and to create a series of contingent remainders, one after another, which it must do, or

Tit. 18. c. 1. § 8.

tator appeared, that the word issue should be *designatio personæ*, or whether he designed it to be a word of limitation; and they held that the testator designed it to be a description of the person, because he added a farther limitation to the issue, viz. and to the heirs of such issue for ever.

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Lord Ch. J. Parker delivered the opinion of the whole Court, that the devisee was made tenant for life, remainder to the issue in tail. The words of the will, he said, were so express to this purpose, that neither any words that could have been used, nor any arguments, could make it plainer; this he said was both the obvious and the legal sense of the words, and what they would have imported in a conveyance.

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51. J. Newson devised a moiety of certain lands, after the death of his wife, to his daughter Susan, during the term of her natural life, and after her decease, to the issue of her body lawfully begotten, and their heirs for ever. Susan had one daughter born before the will was made, and two born after.

Lord Kenyon said, that in a will, issue was either a word of purchase, or of limitation, as would best answer the intention of the devisor: though in the case of a deed, issue was universally taken as a word of purchase. Therefore, without disputing any of

the former cases, but on the contrary in confirmation of them all, and relying upon them for the foundation of this judgment, namely, that the intention of the devisor must prevail, he was of opinion that the devisor, in this case, used issue as a word of purchase, and consequently that Susan took only an estate for life, and her children took an estate in fee simple.

Judgment was given accordingly.

52. It has been stated in a former chapter, that where a testator appears to have a particular intent, and also a general manifest intent, both of which cannot by any mode of construction be carried into effect; the courts will construe the will in such a manner as to effectuate the general intent, though by that means the particular intent is defeated.

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King v. Burchall, 4 Term R. 296. note.

cousin William King, his heirs and assigns for ever. And taking notice that he had covenanted to settle 50*l.* a year upon his wife, in part performance thereof, he devised houses at Maidstone to her, to hold for her life, as part of her jointure; and from and immediately after her death, he gave the same to his cousin James Harris, for and during the term of his natural life; and from and immediately after the determination of that estate, unto the issue male of the body of the said John Harris, lawfully to be begotten, and to his and their heirs; and for want of such issue, to his cousin William King and his heirs; with a proviso that if John Harris or his issue should alienate the premises, he should pay 2000*l.* to the person who ought next to take by virtue of the devises aforesaid.

Lord Henley.—The first question made by the plaintiff's counsel was, whether Harris took under the will an estate for life only, or an estate tail. And they founded their arguments of its being an estate for life, on the word issue being technically a word of purchase, and on the superadded words of limitation; and they compared this case to Loddington v. Kyme, amongst many other cases. The true answer is, that there can be no technical words in a will, but they are to be construed according to the intention of the parties. 2°. This case has no resemblance to Loddington v. Kyme: that was expressly upon two contingencies; to A. for life, and if A. have issue, then to such issue in fee; and if he die without issue then to B. in fee. There the Court construed the word issue to be *nomen singulare*; and were well warranted in so doing, by the intent of the party. But here it is and must be plural, and if the issue

ante, § 49.

were to take as purchasers, they must take as tenants in common; and put the case that J. Harris had ten sons, and the nine eldest died in his lifetime, leaving children, yet the tenth and only surviving son would carry away the whole inheritance. The testator intended the word issue to be a word of limitation in this case, and that W. King should take on failure of issue by J. Harris, whenever that should happen, and has carved the whole fee in particular estates, and remainders, for want of such issue, *i. e.* for default of such issue. There is something of peculiar force in this expression, and the law supposes that the inheritance already attached in the first taker, but liable to be defeated by a subsequent event, his dying without issue; and by no rule of law can it admit of that narrow rule of construction put on it by the plaintiff's counsel, viz. of being confined to issue living at J. Harris's death. They say, that if it be construed to be an estate tail in J. Harris, the superadded words of limitation to the word issue, must be rejected, as nugatory. I agree it is a sound rule in the construction of deeds and wills that every word ought to stand, if consistent with the manifest intention. Therefore in Backhouse v. Wells, the limitation being to A. for life only, and after his decease to his issue, if God should bless him with any; the Court, first on account of the negative word only, secondly because the word issue was so connected as to be construed *nomen singulare*, held it a word of purchase. So in Shaw v. Weigh, and the word heir in Maggot v. Sewell. But where there is an evident necessity to make it plural, there the same necessity requires that the superadded words of limitation should be rejected; and there is no case or authority to show that the word issue, or heirs, when

ante, § 50.

manner as certain lands which the testator devised by the same will; that is to say, to B. for life, without impeachment of waste, and from and after the determination of that estate, to trustees and their heirs during the life of B. to preserve contingent remainders, remainder to the heirs of the body of B. with remainder over, with a power to B. to settle a jointure.

Lord King held, that as to the lands devised, B. took an estate tail, it being within the rule in Shelley's case; but as to the other point, he declared the Court had a power over the money directed by the will to be invested in land. That the diversity was where the will passed a legal estate, and where it was only executory, and the party must go to the Court of Chancery in order to have the benefit of the will: that in the latter case the intention should take place, and not the rules of law; so that as to the lands to be purchased, they should not be limited to B. for life, with power, &c., remainder to the heirs of his body, but to B. for life, with power, &c., remainder to trustees during his life, to preserve contingent remainders, remainder to his first and every other son in tail male, remainder over.

Ashton v. Ashton, Collect. Jur. vol. 1. 402.

59. Joseph Ashton by his will gave 1200*l.*, in money and 6000*l.* South Sea annuities, in trust, as soon as conveniently might be after his death, to sell the same; and lay out the money in a purchase of lands of inheritance, to be conveyed to G. I. Ashton for life, and after his death, to the issue of his body, lawfully begotten, and for want of such issue to H. Ashton in fee. G. I. Ashton brought his bill for the performance of this trust; and at the hearing of the cause, one question was, what estate the plaintiff ought to take in the lands to be purchased, whether

for life only, or in tail; it being insisted on his part, that had this been a devise of the lands, he would clearly have been tenant in tail, and the trust ought to receive the same construction.

Sir Joseph Jekyll held, that he ought to be made tenant for life only of the lands to be purchased: and decreed that they should be conveyed to the plaintiff for life, with remainder to trustees to preserve contingent remainders, with remainder to his first and other sons in tail general, with remainder to his daughters in tail, as tenants in common, and not as joint-tenants, with cross remainders between them, with remainder in fee to H. Ashton.

60. Sir T. Pershall devised all his real estate to trustees, upon trust to convey the same to the use of his niece Arabella (who afterwards became Lady Glenorchy) for life, without impeachment of waste, remainder after her death to her husband for life, remainder to the issue of her body, with several remainders over.

Glenorchy v. Bosville, Forrest. 3. Collect. Jur. vol. 1. 405.

This case first came on before Lord King, who took time to advise, and to have the opinion of the Judges. It afterwards came on before Lord Talbot, who after long argument and deliberate consideration, held that Lady Glenorchy was entitled only to an estate for life, with remainder to her husband for life, remainder to trustees to preserve contingent remainders, remainder to her first and other sons in tail, and decreed a settlement accordingly.

61. A. Meure devised all his lands to trustees and their heirs, in trust to sell the same, and with the money arising by the sale to purchase other freehold lands, or long annuities or stock; and then in trust to permit the plaintiff and his assigns to receive the

Meure v. Meure, 2 Atk. 265.

interest and profits thereof during his life, and after his decease then in trust for the use of the issue of the body of the plaintiff lawfully begotten; and in default of such issue, the testator devised the principal and interest, arising by sale of his said estate, to another.

Sir Joseph Jekyll said, the principal question was, whether an estate tail was to be limited to the plaintiff, or an estate for life only. He observed that the case of Glenorchy *v.* Bosville was in point; and he should decree accordingly.

Roberts v. Dixwell 1 Atk. 607.

62. Sir T. Sandys by his will directed his trustees to convey a full fourth part of all his freehold lands to the use of his daughter Priscilla, for and during the term of her natural life, and so as she alone, or such persons as she should appoint, should take and receive the rents and profits thereof; and so as her husband should not intermeddle therewith; and from and after her decease, in trust for the heirs of the body of the said Priscilla for ever. The principal question was, whether this was a trust executed or executory; for if executed, Priscilla was then tenant in tail, and her husband intitled to be tenant by the curtesy; the contrary, if executory only.

Lord Hardwicke said, the question was, how this trust ought to be carried into execution, and in what manner the trustees ought to convey. Priscilla herself was dead, and yet it must be considered what kind of estate the trustees ought to have conveyed to her, if she had been living. First, whether to Priscilla in tail, or to her for life only. If the conveying an estate tail would have answered the purpose of the testator in his will, then this case need not have been varied from former cases. But he was of opinion, the conveying an estate tail here would have defeated

the intention of the testator. To be sure where an estate had been granted or given by will to A. for life, and to the heirs of the body of A., such a devise had been by the common law united so in the first person, as to convey to him an estate tail: The same construction too had prevailed with respect to trust estates; but in the present case there were all sorts of trusts, as to mortgage, sell, &c. But the latter part of the trust was merely executory, to be carried into execution after the performance of the antecedent trusts; the whole direction therefore fell on the Court, and they were to direct how the parties were to convey. That the Court had taken much greater liberties in the construction of executory trusts, than where the trusts were actually executed. Decreed, that the estate should be conveyed to Richard Sandys, the eldest son of Priscilla, and the heirs of his body, remainder to the second son and the heirs of his body.

68. In the case of Austin v. Taylor, Lord Keeper Henley said, it had been argued, that the devise created an executory trust, but that these words had no certain signification. In Papillon v. Voyce, Lord King called that an executory trust, where the party was obliged to go to the Court of Chancery for an execution of the trust. But it was the same in every case of a trust, and the determination must be the same in all cases; that is, according to the intent. Papillon v. Voyce, was a sound determination. In the case of marriage articles, when there were only heads of settlement, which the trustees were to make, the Court could not decree otherwise than an estate for life in the first taker, with contingent remainders. An estate tail in the first taker would be no settlement at all. So in Leonard v. Earl of Sussex, the distinc-

ante, § 25.

Amb. 377.

Tit. 32. c. 22. § 32.

tion seemed to be, where the testator had directed the trusts, and where something was left and referred to the trustees to be done, as in Lord Glenorchy v. Bosville. He was of opinion that in the case of imperfect trusts only, the Court could make a different construction from a legal limitation. In this case there was no reference to the trustees; without that ingredient he did not find any case where the Court had given a different meaning, from what a court of law would on a legal limitation. Nothing was left to the trustees to be done, but to buy the land; the testator had declared the uses of the land when purchased. He did not believe the testator intended the trustees should make a conveyance. It was said, if the words in the former limitation had been again repeated, it would have been the very case of Papillon v. Voice; but he thought otherwise. There was a direction in that case to the trustees to convey and settle; but there was no direction here. The true guide was this: where the assistance of trustees, which was ultimately the assistance of the Court, was prayed in aid to complete a limitation, in that case the limitation in the will not being complete, it was a sufficient declaration of the testator's intention that the Court should model the limitations: but where the trusts and limitations were expressly declared, the Court had no authority to interfere, and make them different from what they would be at law.

White v. Carter, Amb. 670.

64. T. White gave all his personal estate to trustees, upon trust to lay out the same in land, to be settled and assured as counsel should advise, unto and upon the said trustees and their heirs, upon trust to and for the use of the plaintiff, and the heirs male of his body, to take in succession and priority of birth; and

for default of such issue male, then upon further trust, and to and for the use of his niece Ann Robertson, in the same manner. And after deducting the costs and expences of the trust, he orders his trustees to pay the remainder of the interest, dividends, and profits, until the purchase or purchases should be made, to the plaintiff and Ann Robertson respectively, and unto their respective sons and issue male, who should be respectively entitled to the rents of the freehold estates when purchased, by virtue of the limitations aforesaid.

Upon a bill for the performance of the trusts, the question was, whether the lands to be purchased should be settled on the plaintiff as tenant in tail; or in strict settlement upon him for life, with remainder to his first and other sons in tail male.

Lord Northington directed the settlement to be made on the plaintiff for life, with limitations to his first and other sons in tail male. The cause was reheard before Lord Camden, who was clearly of opinion to affirm the decree; and took a distinction between the case where a testator has given complete directions for settling his estate, with perfect limitations; and where his directions were incomplete, or rather minutes or instructions, and could not be performed in the words of the will. In the former case, the legal expression should have the legal effect, though perhaps contrary to the intention, as in Garth v. Baldwin. In the latter case, the Court would consider the intention, and direct the conveyance according to it. Here the intention was very plain; he directed the settlement to be made by advice of counsel, and in succession and priority: he meant something different from an estate tail, when he wanted the assistance of counsel. And

ante.

though the words in succession and priority might have effect, in case the plaintiff took an estate tail, yet they were meant to give an interest to the sons, after the death of the plaintiff; the latter clause put it out of doubt, he there explained his meaning by making use of the words sons and issue.

Or where the Estates are of different Natures. Tit. 32. c. 22. § 25.

65. When the estate devised to the ancestor, is merely an equitable or trust estate, and that to his heirs, or the heirs of his body, carries the legal estate, they will not incorporate into an estate of inheritance in the ancestor; as would have been the case if both had been of one quality; that is, both legal, or both equitable.

Say and Sele v. Jones, 3 Bro. Parl. Ca. 113. 8 Vin. Ab. 262.

66. Mrs. Ellis devised her estates to trustees and their heirs, upon trust to pay debts and legacies; and to pay the residue to the proper hands of her daughter Cecil Fiennes, who was a married woman, for and during the term of her natural life; and from and after her decease, the said trustees should stand and be seised of and in all the said manors, &c. to the use and behoof of the heirs of her said daughter Cecil Fiennes, severally and successively, as they should happen to be in priority of birth and seniority of age, and to the heirs of their several and respective bodies in tail general.

The question was, whether Cecil Fiennes had an estate tail, or only an estate for life.

Lord King was of opinion, that by the words of the will, the use was executed in the trustees and their heirs during the life of Cecil Fiennes; and that she had only a trust in the surplus of the rents and profits. But by the subsequent words, viz. that the trustees should stand seised to the use of the heirs of the body of Cecil Fiennes, &c. the use was executed in the persons entitled to take by virtue thereof;

Tit. 12. c, 1. § 18.

and therefore there being only a trust estate in the ancestor, and an use executed in the heirs of her body, those different interests could not unite, so as to create an estate tail by operation of law in the ancestor. Upon an appeal to the House of Lords, the decree was affirmed.

67. Lands were devised to trustees, upon trust that they should every year, after deducting rates, taxes, &c. pay such clear sum as should remain to A. B. during his natural life, and after his decease to the use and behoof of the heirs male of the said A. B. lawfully begotten, as they should be in priority of birth; and in default of such issue, remainder over. Shapland v. Smith, 1 Bro. R. 75.

Lord Thurlow was of opinion, that A. B. took only an equitable estate; and the subsequent estate being executed, created a legal remainder in tail, which could not unite; and therefore A. B. was only tenant for life. Tit. 12. c. 1. § 31.

68. A person devised to trustees and their heirs, upon trust to take and receive the rents, issues, and profits thereof, and to apply the same for the subsistence and maintenance of his son during his life; and immediately from and after the decease of his son, the testator gave and devised the said premises unto the heirs of the body of his said son. Silvester v. Wilson, 2 Term R. 444.

It was held, that as the estate devised to the son for his life was merely an equitable one, and the remainder to the heirs of the body of his son was a legal one, the son took only an estate for his life.

69. Thus stood the doctrine respecting the application of the rule in Shelley's case, in the construction of wills; when the case of Perrin v. Blake arose upon a devise made in the following words—"And should my wife be ensient with child at any time hereafter, and it be a female, I give and bequeath unto her Case of Perrin v. Blake, Col. Jur. vol. 1. 283.

the sum of 2000*l.* current money of this island, and to be paid her when she attains the age of twenty-one years, or day of marriage, which shall first happen; and to be generally educated and maintained out of my estate, till her portion becomes payable, without any deduction of the same or any part thereof. And, if it be a male, I give and bequeath my estate both real and personal, equally to be divided between the said infant and my son John Williams, when the said infant shall attain the age of twenty-one. *Item*, and it is my intent and meaning, that none of my children should sell and dispose of my estate for longer time than his life: and to that intent I give, devise, and bequeath, all the rest and residue of my estate *to my son John Williams, and the said infant, for and during the term of their natural lives, the remainder to my brother-in-law Isaac Gale and his heirs, for and during the natural lives of my said sons John Williams and the said infant; the remainder to the heirs of the bodies of my said sons John Williams and the said infant, lawfully begotten, or to be begotten;* the remainder to my daughters, for and during the term of their natural lives, equally to be divided between them; the remainder to my said brother-in-law, Isaac Gale and his heirs, during the natural lives of my said daughters respectively; the remainder to the heirs of the bodies of my said daughters, equally to be divided between them."

The testator died, leaving the said John Williams his only son and heir, and three daughters. The testator's wife was not ensient at his death; and Isaac Gale, the devisee in trust in the will, died before the testator.

This case was argued in the Court of King's Bench in Easter Term 9 Geo. III. and in the Trinity Term following; and in Hilary Term 10 Geo. III. the Judges delivered their opinions *seriatim*.

Mr. Justice Willes said there were two questions—1st, What appeared to be the intention of the testator? 2d, Was that agreeable to the rules of law? The intention was apparent from the introductory clause which governed the whole will. The devise to Isaac Gale was a farther proof of the intent. From every part of the will it appeared that Gale was meant as a trustee to preserve contingent remainders. After the devise to Gale, he gives it to the heirs of the body of his son. If he could give an estate for life to one, and the inheritance to the heirs of the body of the first devisee, and if his intention appeared to be so, he should think that that intention must control the legal sense of the words, heirs of the body. The rule contended for, which was in Shelley's case, was pronounced by Lord Coke upon a deed, and in argument; and though he should be for adhering to it in every case literally within it, yet it must not be extended an inch. The maxim itself grew with feudal policy, and the reasons of it were antiquated. The logicians say, *cessante causâ cessat effectus*, and surely the lawyer may say—I will confine an old rule within its exact bounds, and extend it as little as possible. Having then stated many of the preceding cases, he concluded that the intention of the testator must prevail, which being to give an estate for life only to John Williams, in his opinion he took such an estate only.

Mr. Justice Aston said they were now examining a testator's will, and deciding upon the devises in that will. The first and fundamental rule of law in point was, that the intention of the testator was to be col-

Mr. Justice Yates said, he allowed that upon the construction of a will free scope was to be given to the intention; it was to be collected from various parts, and the whole scheme and design were to indicate the intention: but the intention must be manifestly clear, and likewise fully consistent with every rule of law. There were cases to be met with, even of trusts, where the testator had holden forth strong marks of his intention, and yet because the legal words which he had used bore in legal language a contrary import, the intention gave way to the superior influence of law. After you have fixed the intention, it then becomes a question whether such intention can be executed, consistently with the established rules of law; if it cannot, we had better adhere to the law, and let a thousand testators' wills be overthrown. In considering the question, it was necessary to fix the point. This was a devise of a real estate to John Williams, &c. here was no trust executory, no future conveyance to be made, every thing depended on the limitations in the will itself. It was an axiom in our law, that wills were to be construed according to the intention. This axiom was used at the bar in the fullest sense, and it was said, that the intention of the testator, if legal, should be carried into execution, and allowed, in whatsoever words he should have explained such intention. But he could not accede to so unbounded a position: he agreed that in the case of an executory trust it was so; and this out of humanity to the ignorance of a testator, because in this case no rule of law would be violated: but in the case of a legal devise he conceived the allowing so much favour would overthrow the established law, and endanger property considerably.

In giving his sentiments upon this question he should endeavour to maintain two propositions: First, that in every devise of a legal estate the construction should be agreeable to the legal rules of construction. Secondly, that the rule laid down in Shelley's case was one of them.

If he should prove successful in these propositions, it would immediately follow that John Williams was tenant in tail.

The rule of law mentioned by several writers was this: A will shall be construed so as to fulfil the intention of the testator, so far as it is consistent with the rules of law. And this was as necessary to the safety and certainty of the rules of property, as not allowing a testator to do that which was illegal. These established rules of construction formed the barriers which kept off uncertainty and vexatious litigations of disputed titles; and this certainty, so desirable, could no longer exist than whilst the courts adhered to established rules of construction.

The favour then shown to a will was this; that barbarous words should be supplied; if the devises were imperfect, a necessary implication should be allowed; but if the limitations were perfect, there was no occasion for assistance, and the expressions used must have their legal effect. These technical expressions were the measures of property in legal devises; and the law having fixed a determinate meaning to them, will not permit their sense to be perverted, but directs the Judges ever to adhere to them without the smallest departure.

Secondly, That the rule in Shelley's case was one of the rules of construction: it had its origin in the feudal policy, and grew up in days when the law favoured descents as much as possible. He admitted

that the original reason of it had long since ceased, but he denied that for that reason it must be discountenanced, it having long been the law of the land, and it must continue such till parliament should interpose. But independent of the feudal law, the rule was reasonable and just, and was applicable to a will, as well as to a deed.

Many arguments were used at the bar to show that this will was not within the meaning of the rule in Shelley's case; and the words being different required a different rule of construction. The rule did not speak the word heirs abstractedly, it did not mean to insinuate that there was any magic in the word heirs; it only speaks of the two limitations. To one for life, to his heirs the inheritance. The first gives an estate of freehold, the second gives the inheritance. The freehold was merged in the inheritance, and the ancestor took the whole estate devised.

He then came to the second head of argument, to examine what difference the words made which were used by the testator in the present case.

First the preliminary clause.—It was not difficult to shew that the restriction in this clause was void; it was tantamount to saying, "My son shall not convey a greater interest than for life," and he went on to give him an estate which the law calls an estate tail; that restriction was void, for if the same contained a greater estate limited in the one part, than would bear a restriction, the restriction being repugnant was void. In all the cases it was not what estate the ancestor took, but what estate the heirs took. To let them take the inheritance by purchase, they must be particularly designed; and if this was wanting in the present devise, the inheritance could not rest in the issue of John Williams. That individuals must not

control the general law, otherwise a door would be opened to uncertainty. Upon principle, as well as upon authorities, John Williams must be regarded as tenant in tail: his father willed that he should take for life, and that the heirs of his body should all succeed; this could not be done without making him tenant in tail.

Lord Mansfield said, he always thought that as the law had allowed a free communication of intention to a testator, it would be a strange law to say—"Now you have communicated that intention, so as every body understands what you mean, yet because you have used a certain expression of art, we will cross your intention, and give your will a different construction; though what you meant to have done is perfectly legal, and the only reason for contravening you is, because you have not expressed yourself like a lawyer." That his examination of the question always convinced him that the legal intention, when clearly explained, was to control the legal sense of a term of art, unwarily used by the testator.

It was true the rule in Shelley's case was laid down as stated, but that rule could never affect this question. The real sense and meaning of that rule was this: If the testator gives an estate for life only to A., remainder to the heirs of A.'s body; if the court had said A. was only tenant for life there would have been a contingent remainder to his issue, and then the issue would have been liable to be barred by any forfeiture of the tenant for life; and if he made an estate *pur auter vie*, the remainder was gone: so that the best way of complying with the intention was, to give him an estate tail; by which means the issue were protected by the statute *De donis;* and if an estate only for life was given, as it could have no use in the

world but to cheat the lord of the feudal services, the law very prudently said, that in such cases it should be an estate tail.

This rule was clear law, but was not a general proposition, subject to no control, as where a testator's intention was manifestly on the other side, and where the objections might be answered. He found no cases in Brooke or Fitzherbert where these matters had come in question, so that the Judges were agreed that the intention was to govern, and that Shelley's case did not constitute a decisive uncontrollable rule. This being settled, the question was, whether in this case the testator had so explained his intention as to control the technical expressions, and he agreed with his brothers that he had. It was known that the invention of trustees to support contingent remainders was usually attributed to Bridgeman and Palmer since the restoration: then knowing that these estates might be limited in strict settlement, it was sufficient for the Judges if it appeared that the testator (however he had explained himself) had a strict settlement in his eye, so that from what was said, and from the whole will, he concurred that the intention of the testator was lawful, and such as might be supported. If the intent was doubtful, if it was against law, the legal import of the words must govern. But here there could not be a doubt, the heirs of John Williams's body were to take as purchasers successively. That he should not content himself with general arguments, if any case could be found establishing a contrary doctrine; which led him to say he agreed with his brethren, Aston and Willes, that there was no case which contravened this general doctrine.

It was true great reliance was made on Coulson v. Coulson, but this was a very different case. That

case might stand; and if ever any future litigation should arise upon a question exactly similar to that, he should submit to Coulson v. Coulson; though, if he was sitting in judgment upon that very will, his determination would have been different. It had been said, that case was law, was the unanimous opinion of the Court, was a respectable authority, and always was deemed such: he could not think so. Denison certainly did not agree with his brothers at first, but as he found them strenuously against him, he was very willing to acquiesce upon the certificate being signed. Lord Hardwicke, speaking of Coulson v. Coulson, confined it exactly within its own bounds; and further said—"If that case be law;" which was a great deal for him to say; and so little satisfied with it was he, that the last thing he did in Chancery was to send Sayer v. Masterman here, and he told him he did it to have Coulson v. Coulson reconsidered. It was said the conveyancers had rested on Coulson v. Coulson.

There was no sound distinction between the devise of a legal estate and of a trust, and between an executory trust and one executed; all trusts were executory; and in every shape that a will appeared, the intention must govern.

He admitted there was a devise to John Williams for life, and, in the same will, a devise to the heirs of his body; and he agreed that this was within the letter of Shelley's case; and he did not doubt but there were, and had been always, lawyers of a different bent of genius, and different course of education, who had chosen to adhere to the strict letter of the law; and they would say that Shelley's case was uncontrovertible authority, and they would

make a difference between trusts and legal estates, to the harassing of a suitor.

His opinion therefore was, that the intention being clear beyond doubt, to give an estate for life to John Williams, and an inheritance successively to be taken by the heirs of his body; and his intention being consistent with the rules of law, it should be complied with, in contradiction to the legal sense of the words used by the testator, so unguardedly and ignorantly.

Judgment was given that John Williams took an estate for life.

A writ of error was brought on this judgment, in the Exchequer Chamber; in which the judgment was reversed by the opinion of seven Judges against one: so that, upon the whole, eight Judges were of opinion that John Williams took an estate tail; and four, that he took only an estate for life.

Harg. Tra. 487.

70. Sir William Blackstone's argument on this case, in the Exchequer Chamber, has been published by Mr. Hargrave from his own manuscript, of which the following is an abstract.

The great and fundamental maxim, upon which the construction of every devise must depend, is, "that the intention of the testator shall be fully and punctually observed; so far as the same is consistent with the established rule of law, and no farther."

Some rules of law are of an essential, permanent, and substantial kind, and may justly be considered as the indelible land-marks of property; and which cannot be exceeded or transgressed by any intention of the testator, be it never so clear and manifest; such as, that every tenant in fee simple or fee tail shall have the power of alienating his estate, by the several modes adapted to their several interests.

There are also other rules of a more arbitrary, technical, and artificial kind, which are not so sacred as these, being founded on no great principle of legislation or national policy. Some of these are only rules of interpretation or evidence, to ascertain the intention of the parties, by annexing particular ideas of property to particular modes of expression; so that where a testator makes use of those technical modes of expression, it is evidence *prima facie* that he means to express the self-same thing which the law expresses by the self-same form of words. Thus, a devise of land to another generally, gives him an estate for life; a devise to a man and his heirs, gives him an estate in fee; to a man and the heirs of his body, an estate-tail.

Lastly, there are some rules which are not to be reckoned among the great fundamental principles of juridical policy, but are mere maxims of positive law, deduced by legal reasoning from some or other of the great fundamental principles; such as, that a devise to a man for life, with remainder to the heirs of his body, shall constitute an estate-tail.

The rule in Shelley's case is not to be reckoned among the great fundamental principles of juridical policy, which cannot be exceeded or transgressed by any intention of the testator; but is of a more flexible nature, and admits of many exceptions: for, if the intention of the testator be clearly and manifestly contrary to the legal import of the words which he has thus hastily and unadvisedly made use of, the technical rule of law shall give way to this plain intention of the testator.

The rule of law laid down in Shelley's case is, that where the ancestor takes an estate of freehold,

with remainder to his heirs, or heirs of his body, the word "*heirs*" is a word of limitation of the estate, and not of purchase; that is, in other words, that such remainder vests in the ancestor himself; and the heir, when he takes, shall take by descent from him, and not as a purchaser. It was first established to prevent the inheritance from being in abeyance, and to facilitate the alienation of land.

This rule, when applied to devises, may give way to the plain and manifest intent of the devisor; provided that intent be consistent with the great and immediate principles of legal policy; and provided it be so fully expressed in the testator's will, or else may be collected from thence by such cogent and demonstrative arguments, as leave no doubt in any reasonable mind whether it was his intent or no.

There is no such plain and manifest intent of the devisor in the present case, expressed, or to be collected from any part of this devise, as may control the legal operation of the words, and, at the same time, be consistent with the fundamental rules of law.

The question is not, whether the testator intended that his son John should have a power of alienation; for he most clearly expressed, that the son should not have such a power. The question is not, whether the testator intended that his son should have only an estate for life; for he believed there never was an instance, when an estate for life was expressly devised to the first taker, that the devisor intended he should have any more. But if he afterwards gives an estate to the heirs of the tenant for life, or to the heirs of his body, it is the consequence or operation of law that in this case supervenes his intention, and vests a remainder in the ancestor: and therefore it has frequently been adjudged, that though

1 Vent. 225. 379.

an estate be devised to a man for his life, or for his life *et non aliter*, or with any other restrictive expressions, yet if there be afterwards added apt and proper words to create an estate of inheritance in his heirs, or the heirs of his body, the extensive force of the latter words should overbalance the strictness of the former, and make him tenant in tail, or in fee. The true question of intent would turn, not upon the quantity of estate intended to be given to John the ancestor, but upon the nature of the estate intended to be given to the heirs of his body. That the ancestor was intended to take an estate for life, was certain; that his heirs were intended to take after him, was equally certain; but how those heirs were intended to take, whether as descendants or as purchasers, was the question? If the testator intended they should take as purchasers, then John the ancestor only remained tenant for life; if he meant they should take by descent, or had formed no intention about the matter, then, by operation and consequence of law, the inheritance first vested in the ancestor. The true question, therefore, was, whether the testator had, or had not, plainly declared his intent, that the heirs of the body of John Williams should take an estate by purchase, entirely detached from, and unconnected with, the estate of their ancestor? Or, in other words, whether he meant to put an express negative on the general rule of law, which vests in the person of the ancestor (when tenant of the freehold) an estate that is given to the heirs of his body? It was not incumbent on the plaintiff to show by any express evidence, that his testator meant to adhere to the rule of law; for that was always supposed, till the contrary was clearly proved: but it was incumbent on the defendant to

show, by plain and manifest indications, that the testator intended to deviate from the general rule; for that was never supposed till made out, not by conjecture, but by strong and conclusive evidence. By a devise to a man's heirs, or heirs of his body, the heirs had never been allowed to take as purchasers, excepting in one of these four cases:—1st, Where no estate at all, or no estate of freehold, was devised to the ancestor; there the heirs could not take by descent, because the ancestor never had in him any descendible estate. 2d. Where no estate of inheritance was devised to the heir, as in the case of White v. Collins; for common sense would tell, that in such a case the heir could not take by descent, as heir. 3d. Where some words of explanation were annexed by the devisor himself to the word heirs in a will, whereby he discovered a consciousness, distrust, or apprehension, that he might have used the word improperly, and not in its legal meaning, and therefore he in a manner retracts it, he corrects the inaccuracy of his own phrase, and tells every reader of his will how he would have it understood. 4th. Where the testator superadded fresh limitations, and grafted other words of inheritance upon the heirs to whom he gave the estate; whereby it appeared, that those heirs were meant by the testator to be the root of a new inheritance, the stock of a new descent, and were not considered merely as branches derived from their own progenitor. The evidence of intent, in this case, might be resolved into two particulars: 1st. The testator's previous declared intention, that none of his children should sell or dispose of his estate for longer term than his own life. 2d. The interposed estate to Isaac Gale and his heirs, on which much stress could not be laid; for, if that estate had been

ante.

expressly given to preserve contingent remainders (which was only a conjecture), the case of Coulson v. Coulson was an express authority, that this would not make the heir of the body a purchaser. If this was so, the introductory words were the only evidence of intent, and then the result of the whole matter was, that the testator having declared his intent that his son should not alien his lands, he, to that intent, gave his son an estate to which the law has annexed a power of alienation;—an estate to himself for life, with remainder to the heirs of his body. Now, what was a court of justice to conclude from hence? Not that a tenant in tail thus circumstanced should be barred of the power of alienation; this was contrary to fundamental principles. Not that the devisee should take a different estate from what the legal signification of the words imported; this, without other explanatory words, was contrary to all rules of construction; but plainly and simply this, that the testator had mistaken the law, and imagined that a tenant for life, with first an interposed estate, and then a remainder to the heirs of his body, could not sell or dispose of his interest. Upon the whole, he concluded, that though it did appear that the testator intended to restrain his son from disposing of his estate, for any longer term than his life, and, to that intent, contrived the present devise, yet it did not appear by any evidence at all, much less by declaration plain, that, in order to effectuate that purpose, he meant that the heirs of the body of his son should take by purchase, and not by descent, or even that he knew the difference. The consequence was, that, by the legal operation of the words, which were not controlled by any manifest intent to the contrary, the

heir could only take by descent, and, of course, John Williams the son was tenant in tail.

General Observations on the Rule.

71. It is observable, that in the several cases in which the question has arisen, whether the rule in Shelley's case should be applied to the construction of a will, the objection to its application has always been founded on the obvious intention of the testator, to give the first devisee no more than an estate for life; without considering that in all those cases the testator devises the remainder expectant on the determination of the first estate, to the heirs general, or special, or to the issue of the first devisee; and that it is as necessary to ascertain his intention in the second, as in the first devise. There can be no doubt but that where a common person devises his estate to A. for life, with a remainder to his heirs general, or special, or issue, he does not mean to give A. any greater estate than for his life; and as to the addition of negative words, or a devise to trustees to preserve contingent remainders, they can add nothing to the clearness of the first words. The whole difficulty therefore lies in ascertaining the intention of the testator in the second devise; or, as Sir W. Blackstone says, "the true question of intent will turn, not upon the quantity of estate intended to be given to John the ancestor, but upon the nature of the estate intended to be given to the heirs of his body;" and where the second devise is inconsistent with the first, to adopt such a construction as will best effectuate the general intent of the testator. It is for this purpose that the rule is applied; upon a principle which has been already stated, and which is fully explained by Lord Ch. J. Wilmot in his very able judgment in the case of Roe v. Grew; and by Lord Kenyon in several cases which have been already

Robinson v. Hicks, ante, c. 12. ante, § 55.

stated in chapter 12; namely, that where a testator shows a particular, and also a general intent, which are inconsistent with each other, the general intent will be established, and the particular one disregarded.

72. In all the cases where the rule has been applied, there was a devise to A. for life, with a subsequent devise to the heirs general, or special, or issue, of A.; and the testator had a particular intent, to give an estate for life only to A., and a general intent, to give estates to all the lineal descendants of A. If the will were construed according to the particular intent, the first devisee would take an estate for life only, and the word heirs, or heirs of the body, or issue, must operate as words of purchase. But by this mode of construction the general intent that all the lineal descendants of A. should take successive estates of inheritance, either in fee, or in tail, would be defeated. For if the remainder was devised to the heirs of A. it must vest in the person who was heir general to A. at the time of his death; and in that case it could not go in succession from him, to succeeding heirs of the same ancestor, not being heirs general of the first heir; but might eventually go to strangers, either in defect or exclusion of the heirs of such ancestor. If the remainder was devised to the heirs of the body of A. it would vest in the person who was heir of the body of A. at the time of the testator's death, and would descend to the heirs of the body of that heir; and on failure of issue of that person, it would go by a *quasi* descent to the next person who answered that description, at the time of the failure of such issue, in conformity to Mandeville's case; so that if the devisee had several sons, the first would take an estate tail, but none of the

Fearne's Cont. Rem. 6th ed. 192.

Tit. 32. c. 21. § 35.

1 Inst. 26 *b*.

Morris v. Ward, ante, § 19.

other sons would take vested estates, while the eldest or any issue of his body were in existence.

Roe v. Grew, ante, § 55.

If the remainder was devised to the issue of A. the estate would vest in all his children, as joint tenants for life, and tenants in common of the inheritance.

The consequence is, that in order to effectuate the general intent of the testator; which in the three cases put certainly is, that the estate devised shall go to all the lineal descendants of the first devisee, in a course of inheritance; and shall not go over as long as there are any such descendants remaining; the Court is obliged to apply the rule, and to construe the second devise in such a manner as to create an estate in fee or in tail in the first devisee.

8 Term R. 519.

78. This doctrine is fully confirmed by Lord Thurlow in his determination of the case of Jones v. Morgan, in which he concluded his judgment in these words—"By all the cases, where the estate is so given that after the limitation to the first taker it is to go to every person who can claim as heir to the first taker, the word *heirs* must be a word of limitation; all heirs, taking as heirs, must take by descent. In cases where I can bring it to the point, that the testator by the word heirs, as used in the will, means first, second, third, and other sons, there I change the words of the will. But here I think the word heirs was the very thing he meant. Suppose William had had a son, which son had had a son, and died living Sir William; the eldest son of the son would have been heir; if there had been a title he would have taken it; but the estate, if these had been words of purchase, must have gone to the second son, the devise to the first son being a lapsed devise, like the case of Warner v. White, lately in the House of Lords, from Ireland. But Sir William Morgan meant

ante, § 27. 1 Bro. R. 219.

ante, c. 8. § 27.

the estate to go to whoever should be heir. I think the argument immaterial that he meant the first estate to be an estate for life; I take it that in all cases the testator does mean so; I rest it upon what he meant afterwards. If he meant that every other person who should be heir should take, he then meant what the law would not suffer him to give, or the heir to take as a purchaser. In conversing with a great authority, whom I will not name, I asked what would become, in the case stated, of the grandson; the answer was, he should take as heir. I know he might, but then he must take by descent; all possible heirs must take as heirs, and not as purchasers. Many cases have been determined on the ground of a devise to the first taker, with a remainder to the heir male in the singular, or heirs male in the plural, as in King v. Burchall before Lord Henley, where it was in the singular number. ante.

The rule in Shelley's case was used as a demonstration that it was indifferent whether the limitation was in the singular or in the plural number; it was equally an estate tail. So where it is to the heir of the first taker, and to the heirs of that heir, it has been determined to be an estate tail. Indeed in all cases where the limitation is of an estate of freehold to a man, and afterwards to the heirs of his body, whether general or special, so as to give it to the heirs as a denomination or class, the heirs shall be in by descent, and not by purchase. And the case stated by Anderson in Shelley's case, of a limitation to the use of A. for life, remainder to the use of his heirs, and of their heirs female, is the only one to the contrary; and in that case the word heirs must be a description of persons, in order to let in the limitations to the heirs female.

Cont. Rem. 6th edit. 196.

74. Mr. Fearne's conclusion to his observations on the rule appears to have been founded on the same principle; or if not, is certainly conformable to it: for he says, "Wherever the ancestor takes the freehold, the inheritance will not go to all the heirs, &c. in the course of inheritable succession, unless by an actual descent; and consequently if, after the first taker, it is to go to every person who can claim as heir to him, the intended succession can only be effectuated by taking the word heirs, &c. as a word of limitation. If after him all heirs, &c. are to take as such, that is, as answering that description, they can only take by descent. If the law will not admit of all possible heirs, &c. taking the inheritance, after its inception by a freehold in the ancestor, otherwise than by descent; it follows, that wherever the limitation to the heirs, &c. after a freehold to the ancestor, is admitted to reach the whole denomination or class of heirs described, they must take by descent, and not by purchase."

TITLE XXXVIII.

DEVISE.

CHAP. XV.

Construction—What words create a Joint Tenancy, or Tenancy in Common, and Cross Remainders.

1. *What words create a Joint-Tenancy.*
10. *What words create a Tenancy in Common.*
26. *What words create Cross Remainders.*
33. *Formerly not implied between more than Two.*
38. *This Doctrine somewhat altered.*

SECTION 1.

WITH respect to the words which create a joint tenancy in a will, it has been long settled that a devise to A. and B. generally, or to A. and B. and their heirs, makes them joint tenants. So where a man devised lands to his two daughters and their heirs, it was resolved that they took an estate in joint tenancy. What words create a Joint Tenancy. Tit. 18. c. 1. § 3. Anon. Cro. Eliz. 431.

2. Though the estates devised to two or more persons, in this manner, should have different commencements, yet the devisees will take as joint tenants, as appears from two cases which have been already stated. ante, tit. 18. c. 1. Aylor v. Cheap. Oates v. Jackson.

3. Wherever lands are devised to two or more persons, with a benefit of survivorship among them, they will take as joint tenants; though there are other

words in the will indicating an intention to create a tenancy in common.

Fowler v. Ongley, And. 194. Webster's case, 3 Leon. 19.

4. Lands were devised to A. B. and C. in tail; and then followed these words—I will that every of them be the other's heir, by equal portions.

The Court at first held this to be a tenancy in common; but afterwards upon good consideration it was adjudged to be a joint tenancy, for so it was implied; and it was as much as to say that each survivor should be the other's heir.

Furse v. Wicks, 2 Roll. Ab. 89.

1 Vent. 216.

5. Lord Hale says, a devise to two, equally to be divided between them, and to the survivor of them, makes an estate in joint tenancy, upon the express import of the last words.

Tuckerman v. Jefferies, 3 Bac. Ab. 681. Holt. Rep. 370.

6. A person devised to Jane the wife of B. and to Elizabeth the wife of C. all his estate, &c., to be equally divided between them, during their natural lives; and after the deceases of the said Jane and Elizabeth, to the right heirs of Jane for ever.

The question was, whether this devise made Jane and Elisabeth joint tenants for life, so as upon the death of Jane the whole survived to Elizabeth for life; or whether upon the words, equally to be divided between them, they were tenants in common.

Lord Holt pronounced the opinion of the Court, that they were joint tenants, notwithstanding the words, equally to be divided between them, and the lands ought to survive to Elizabeth. 1st. Though upon such words generally, they would be tenants in common, yet if it should be so in this case, it would be expressly against the intent of the testator, and would defeat the heirs of Jane of part; for they were to take altogether, and not by moieties, one at one time, and one at another, but all at once;

and if they should be tenants in common, they must take by moieties, at several times. 2dly. It was express that the heirs of Jane were not to take till after both their deceases. 3dly. If they should be tenants in common, then the heirs of Jane would be in danger to lose a moiety; for as to that one moiety, it must be a contingent remainder; so that if Elizabeth should die during the life of Jane, the contingency for that moiety not happening, it must descend to the heirs at law of the testator, who were Elizabeth and the issue of Jane, as coparceners. 4thly. Jane and Elizabeth were heirs at law to the testator, and as such, the whole would have descended to them in coparcenary, if no will had been made; but here, by this will, it was plain the testator intended to prefer the heirs of Jane to the whole.—Judgment accordingly.

7. Andrew Hawes, the plaintiff's grandfather, devised several lands to his four younger sons, William, Charlton, Andrew, and Thomas Hawes, their heirs and assigns, equally to be divided between them, share and share alike, as tenants in common, and not as joint tenants, with benefit of survivorship: and also devised all his messuage in Chatham unto his said four children, their heirs and assigns for ever, equally to be divided, share and share alike, as tenants in common as aforesaid, and not as joint tenants, with like benefit of survivorship; and died, leaving his eldest son Harewell Hawes, and the said four other sons. In 1727, Charlton Hawes died an infant and unmarried; and some time after, Harewell Hawes the eldest son, and his wife, by fine and recovery conveyed, *inter alia*, the undivided fourth that had belonged to Charlton, of the lands devised by his father, to the use of such persons, and for

Hawes v. Hawes, MSS. Rep. 1 Wils. R. 165.

such estates, as he and his wife should appoint; and for want of such appointment, to the use of himself for life, remainder to his wife for life, remainder to his own heirs and assigns.

In 1728, no appointment being made, Harewell Hawes by will devised all his freehold lands to trustees, in trust to sell so much as should be necessary for payment of his debts: and what should remain unsold, he directed his trustees to convey equally to his three children, the plaintiff Nathaniel, Martha, and Elizabeth one of the defendants, and their heirs for ever, as tenants in common, or to the survivors and the heirs of such survivors, at their ages of 21 years; and the rents and profits, after his wife's decease, to be had and received towards the education and bringing up of his said three children, during their minorities: and gave his personal estate equally between his three children and his wife, whom he made executrix; and died, leaving the plaintiff his son, and his two daughters Martha and Elizabeth, the first of which (Martha) died an infant in 1740, and unmarried.

The plaintiff having attained his age of 21, brought his bill to be let into the undivided fourth of his uncle Charlton, which he insisted did, by his death, descend upon his father Harewell Hawes, as heir to Charlton, and was by him well conveyed to the plaintiff by the above settlement and will: and also to be let into the share of his sister Martha, of their father's real estate; insisting that she dying before 21, the share of their father's real estate intended her, upon the happening of that contingency, was now a resulting trust for the benefit of the plaintiff, as heir at law to his father; or that if any thing was actually vested in her, she had it as tenant in common, and

upon her death it descended to the plaintiff, as her brother and heir.

There were two questions:—The first between the plaintiff and the defendants his surviving uncles, upon the grandfather's will; whether the four devisees were joint tenants, or tenants in common: if the former, the share of Charlton survived to the defendants the uncles; if the latter, his share went on his death to Harewell Hawes the plaintiff's father, as heir to him, and was by him well conveyed to the plaintiff. The second was between the plaintiff and the defendant Elizabeth his only sister, whether any and what interest vested in any of the children before 21, under their father Harewell Hawes's will.

Lord Hardwicke said, the question arising upon Andrew Hawes's will was, whether there was a joint tenancy or a tenancy in common generally, or a tenancy in common attended with a particular limitation over, either generally or upon a contingency. This was a devise to younger children, a circumstance to be considered, in determining whether they took as joint tenants or tenants in common. The general rules were plain: joint tenancies were not favoured in equity, because they did not tend to make proper provisions for families; and though the law favoured them formerly, as multiplying tenures, yet as tenures were taken away, the law leant against them now. Another rule was no less certain; that if there were many words, and some introductory to others, such a construction was to be made as would render all the words consistent, and to have a meaning if possible; but if that could not be done, and that some words must be rejected, they must be such as were least consistent with the party's intent. But if an uniform construction could be made of all the words, so as

that each should have effect, the Court would do it. Here was an immediate devise to the four children in fee, as tenants in common; and the words, "with benefit of survivorship," ought not to receive such a construction as to control the devise, since that would be over-ruling certain words by ambiguous ones.

There had been two constructions put upon these words, 1st, as being only descriptive of one quality of joint tenancy: but that was too refined, and not agreeable to the use the testator had made of these words in other parts of his will; for where he declared the custom of London, as to the orphanage part of his personal estate, and disposed of the testamentary part, he made use of the words, "with like benefit of survivorship," not to exclude survivorship, but to give it.

The second construction was, that they related to a dying before the testator, which was an admission that they ought to have some construction; and if no other could be found, he did not say that he would not put that construction on them. Though in that case if any of the children should die before the testator, leaving children, such children could not take; as their father's share would then go over: but in such case the testator might make a provision for them in his life. But parents seldom provide by their wills for contingencies which may happen in their own life; and strictly speaking survivorship respects a time after the testator's death, the *jus accrescendi* pre-supposing an actual vesting of the interest in the parties. In the case of Bindon v. Suffolk*, Lord

1 P.Wms. 96.

* That was a case of personal property, being a devise of 20,000*l.* unto five persons, equally to be divided between them, share and share alike, and if either of them died, to the survivors or survivor of them. Held, a tenancy in common, 4 Bro. Parl. Ca. 574. Vide Doe v. Abey, 1 Maule and Selw. 428.

Cowper reasoned rightly, that the words could not mean a dying at any time, but at some particular period, which he confined to the testator's lifetime. Indeed in the House of Lords it was referred to the time of payment. But still it was referred in both to some particular period; and the debt in that case being desperate, and the division to be made when the debt was paid, the Lords referred the survivorship to the time of the division. Now the question was, whether upon the whole frame of this will there was not another period, besides the testator's death, to which it was more natural to refer the words of survivorship. In that part of the will relating to the orphanage share, the testator could not by those words mean a survivorship of himself, the benefit there being to arise after his death, and after the custom should attach. If therefore one of the children had come to 21, and demanded his share, he must have had it, and if another child had afterwards died an infant, unmarried, the survivors had been entitled. He therefore thought this clause would afford some light towards understanding that in question; for in the disposition of the testamentary part, there was the same benefit of survivorship intended, as in the orphanage part. The word *like*, was a word of reference, being the same as if the testator had said, if any one die before 21 unmarried, his share shall go to the survivors; and the point was, what effect this would have upon the other clause. The testator was making a fund for his younger children, the very same as were legatees of the testamentary part, which was expressly given over if any died before 21 unmarried; and therefore he thought the benefit of survivorship, as to the estate in question, must be the same benefit of survivorship which he had directed

before as to the personal estate; which was a very natural intention, that if a child should die before he could make use of his share, it should go over to the others. It was said that the word *like* was not inserted in this clause; but he thought that was of no weight, he having used the same words in such a sense as to make no doubt of his meaning: and though the making the children joint tenants would certainly overturn many words in the will, yet by construing this to amount to a limitation over upon a contingency, all the words would be consistent; and he thought it the same as if the contingency had been expressly repeated. This was called proceeding by arbitrary conjecture, but he thought it a reasonable intendment; for, which was the most natural construction? that the survivorship should relate to the testator's death, or mean a survivorship amongst themselves: and if this construction was right, the case stood clear of all the authorities; and as Charlton died under 21, and unmarried, his share survived to the other three children.

The next question arose upon the will of Harewell Hawes, namely, at what time those shares vested in the plaintiff and his sisters; whether immediately, or upon their attaining their age of 21. When the conveyance was to be made, they must certainly take as tenants in common, for divided shares must be conveyed: and as to suspending the conveyance till the youngest attained 21, he thought it not a right construction; for the words were disjunctive, *when she and they, &c.*, yet he thought the word *and* ought to be construed as *or*, otherwise the trust of the rents and profits would cease, as to each child that attained 21, and he could neither have lands nor rents, till the youngest also should attain 21. Now, one of the

children dying under 21, the question was, whether her share should descend to her heir at law, or survive; and he thought it survived; and that this clause must be construed in the same manner as if that relating to the rents and profits had been placed first. The will must have the same construction wherever the clauses were placed; and placing them as he just then did, there would have been a joint tenancy, during their minorities; and if one died under age, his or her part would not descend, but survive to the others, and go towards their maintenance. This gave a light to the time when the conveyance was to be made, and for whose benefit; for if any died before 21, it showed he or she was not intended to take, and that the conveyance was to be made at a limited time, that of their attaining 21: and if the plaintiff had attained 21 and died, and then one of his sisters had died under 21, he thought the conveyance of her share ought to be made to the heir of the plaintiff, and the surviving sister, because, as to the plaintiff, the contingency of survivorship would then be over.

8. In a modern case lands were devised, after an equitable estate for life, to the testator's niece Sarah; for the use of the heirs of the body of the said Sarah, lawfully begotten or to be begotten, their heirs and assigns for ever, without any respect to be had or made in regard to seniority of age or priority of birth: and the Court of K. B. held, that they took as joint tenants, because they were to take together, without regard to seniority of age or priority of birth. Doe v. Ironmonger, 3 East, 533.

9. It has been stated in a preceding chapter, that where there are two different dispositions of the same estate in a will, the two devisees shall take in moieties. ch. 9. § 26.

1 Inst. 112. *b.* n. 2 Atk. 373. 3 — 493.

And Mr. Hargrave says, that in some of the old books, it is said generally that there shall be a joint tenancy; but according to the modern opinion, and it seems the best, there will be a joint tenancy, or a tenancy in common, according to the words used in limiting the two estates: by which it is meant, that if the two estates given by the will, have the unity or sameness of interest essential to a joint tenancy, the devisees shall be joint tenants; but otherwise shall be tenants in common.

What words create a Tenancy in Common.

10. Wherever an estate is devised to two or more persons, and there are any words in the will indicating an intention that the devisees shall take several and distinct shares, they will be tenants in common.

Torret v. Frampton, Stiles, 434.

11. A person devised lands to his wife for life, remainder to A. B. and C. and their heirs respectively for ever. The question was, whether A. B. and C. were joint tenants or tenants in common.

The Court held that here was a tenancy in common, and that it should go throughout, and was not to be divided; and the intent of the devisor appeared in the will, that every one should have his part, and their heirs: so here was a provision for children; and the word respectively would be idle, if another construction should be made, and would signify no more than what the law said without it.

Lewen v. Cox, Cro. Eliz. 695. 1 Vern. 32.

12. One Lewen devised lands to his two sons, equally, and their heirs. It was adjudged that the devisees took as tenants in common; for otherwise the word *equally* would have no meaning.

James v. Collins, Cro. Car. 75. Het. 29.

13. Lands were devised to five persons, their heirs and assigns, all of them to have part and part alike, and the one to have as much as the other. Adjudged to be a tenancy in common.

14. A person devised a messuage with the appurtenances unto M. G. and T. R., equally to them, his sister's sons. Dunn v. Gaskin, Cowp. 657.

Lord Mansfield said, there was no room for argument; *equally* implied a division; whereas if they were to take as joint tenants, there would be no division.

15. The words "equally to be divided" have always been held to create a tenancy in common in a will, because they imply a division; whereas between joint tenants there is no division: unless there are other words in the will, as in some of the preceding cases, that give a right of survivorship. 3 Rep. 39 *b.*

16. A man devised to his wife for life, and after her decease, to his three daughters, equally to be divided; and if any of them died before the other, then the survivors to be her heirs, equally to be divided, and if they all died without issue, then over. King v. Rumbal, Cro. Ja. 448.

It was held, that the daughters were not joint tenants, but that they had several inheritances in tail, with cross remainders.

17. A man devised lands to his two sons and their heirs, and the longer liver of them, equally to be divided between them and their heirs, after the death of his wife. Blissett v. Cranwell, Salk. 226.

The Court was of opinion, that the sons were tenants in common, and that the devise was good; and the reason was upon the construction of wills, that it ought to be according to the intent of the devisor; his intent appearing to be, not only to provide for his two sons, but for their posterity: that not only his two sons, but their heirs, should have an equal part; for the words were, "equally to be divided between them and their heirs." And though by the first words it was given to them and the sur-

vivor of them, yet the last words explained what he intended by the word "survivor;" that the survivor should have an equal division with the heirs of him who should die first. And though the testator had not aptly expressed himself, yet upon all the words taken together, his meaning seemed to be so.

Prince v. Heylin, 1 Atk. 493.

18. A person devised two leasehold houses to J. P. and J. H. and then said—"My will and meaning is, that the rents of my two said houses shall be equally shared and divided between them the said J. P. and J. H. as aforesaid."

It was held by Lord Hardwicke, that the devisees took as tenants in common.

Sheppard v. Gibbons, 2 Atk. 441.

19. A person devised a freehold estate to trustees and their heirs, in trust to permit his three sisters and their assigns to hold and enjoy the said premises, and to receive the rents thereof, to their sole and separate use; and as his said sisters should severally die, he gave the premises to their several heirs.

Lord Hardwicke held, that the plain meaning of the words, "as they severally die, &c." was, that the sisters should take as tenants in common.

Maryat v. Townley, 8 Ves. 102.

20. A testator devised all his real estates to trustees, as soon as his three daughters should attain their respective ages of 21, to convey to them and the heirs of their bodies, as joint tenants.

Lord Hardwicke, after observing that, on account of the direction to convey, this was an executory trust, in which case the Court assumed greater latitude of moulding the will according to the intention of the testator, gave his opinion, that the daughters did not take as joint tenants; but that conveyances should be made to them at 21 respectively, in tail male, with cross remainders in tail; by which means survivorship would be preserved, upon the death of

any daughter without issue, which was the most that was meant by joint tenants.

21. J. S., seised in possession of some freehold lands, and entitled in reversion to others, made his will in these words,—"*Imprimis*, my mind and will is, that all my debts and funeral expences be paid out of my whole estate; and whereas I am entitled to divers freehold messuages, lands, and tenements at the decease of my aunt M., I hereby give the said premises, as well as my other estate, to A. B. and C. and their heirs, upon trust that at the decease of my aunt M. what my personal estate shall not extend to pay, they shall, by sale or mortgage of any part of my real estate, raise so much money as shall pay off all my just debts; and I hereby order, and my mind is, that the remainder of my estate shall go to, and be equally divided amongst, my three children, Dinah, Frances, and Mary, and the survivor of them, and their heirs for ever. And I do hereby order the guardianship of my son John, as well as of my other said three children, to my wife; and will that she shall educate them out of the rents and profits of their several estates and fortunes, given them, and settled upon them by this my will, or otherwise howsoever." Stones v. Heartley, MSS. R. 1 Ves. 165.

Lord Hardwicke,—"In making a construction of this will, the testator's circumstances, as to family and estate, must be considered. He had one son and three daughters: he had two estates, one in possession, the other in reversion, and intended making a provision by way of portion for his three younger children. The question is, whether these three daughters take as joint tenants, or tenants in common; and I am of opinion that they each take a separate share. Courts of law were anciently very

favourable to joint tenancies, upon account of the tenures, to prevent the splitting them: but since the abolition of tenures, even courts of law have been less favourable to them; but courts of equity always espouse tenancies in common, as being a more equitable provision, and preventing the descent of, and right to, the estate depending upon an accident, that of survivorship, and are still more inclined to them, when the question arises upon provisions for children, whereby an equality is established amongst them. It was said on the one hand that the word "survivor" makes a joint tenancy; and on the other that the words "equally to be divided," should sever it, and make a tenancy in common; and I am of opinion that in this case these last words must prevail: for it could never be the testator's intent, that if any one of his younger children should die leaving children, such children should have nothing at all; but their mother's share should go to the surviving sisters. It was said the daughters might have severed the joint tenancy; but here they were under age; any one of them might have married, and had children, and died under age, before any severance of the joint tenancy could be.

"For the defendant, it was insisted, that the word survivor should relate to such as should be living at the death of M. his aunt, because it was then the division must be made; but that would not do, for so the whole would be suspended, and nothing vest till M.'s death; which was plainly contrary to the testator's intention. The words carried an immediate devise, after the execution of the trust; he directs the rents and profits to be applied for their maintenance, until they attain 21. And I therefore resort to the resolution in Blissett v. Cranwell, which I

ante, § 17.

think fully governs the present case. It is there said, that the testator's intent of providing not only for his sons, but for their posterities, must prevail, and that therefore the sons should be tenants in common: this is a good and substantial reason, and not a playing upon words. Apply it to the present case. This is a provision for children, as well as that; here are the words, "equally to be divided," as there were there, and the objection that the survivor should take the whole, held in that case as well as in this. I take the word "heirs" here to relate to, and the inheritance to be thereby fixed in, them all, and not in the survivor. The taking it in the contrary sense would put the inheritance in abeyance, upon the known difference between a gift to A. and B. and their heirs, which makes them joint tenants, and fixes the inheritance immediately; and a gift to A. and B. and the heirs of the survivor, whereby no inheritance is fixed in either, but remains in abeyance until the death of one of them."

22. A person devised lands to his five children, and the survivors and survivor of them, and the executors and administrators of such survivor, share and share alike, as tenants in common, and not as joint tenants. Rose v. Hill, 3 Burr. 1881.

It was contended that this was a tenancy in common among the five children for life; with a survivorship to the longer liver of them.

Lord Mansfield said, that an estate to more than one, with a benefit of survivorship, was a joint tenancy. But here the testator had expressly declared that they should not take as joint tenants. The construction contended for was too refined for the testator's meaning. He meant to dispose of all his estate real and personal, and he meant to dispose of

his real estate among his children, after the death of his wife. He used the same words in disposing of the real estate, as he did in disposing of the personal, and they explained each other. There were words in the will which plainly showed that he meant his estate to go to the representatives of his children, after their deaths, though he had used improper terms. It was plain that they were not to take as joint tenants; and it was plain to him, that he considered that several of his five children might happen to die in his own lifetime, and therefore made a provision for such of them as should survive him, and be in existence at the time when the interest was to vest, and their representatives. He meant to prevent a lapse, and therefore the Court might rather apply the words to a fixed particular time, than give no meaning at all to them; and this was agreeable to the case of Stringer v. Philips.

1 Ab. Eq. 292.

Mr. Just. Wilmot concurred; he thought the true construction to be, that the words "survivors and survivor" were inserted in order to prevent the consequence of any lapse, by any of the testator's children dying in his own lifetime. He meant his children to be all equal; and if one only or more should survive the rest, at the time of his death, the clause meant, that the share or shares of such survivor or survivors should go to them, and their representatives; but he could never mean to exclude the children of any of his children, who should leave any. This will gave the absolute fee to all, as tenants in common, for executors was equivalent to heirs in a will.

Mr. Just. Yates, who tried the cause, concurred; the testator's intention being as plain as it could be, having said that his children should take as tenants in common, and not as joint tenants; and the word

survivor should not destroy and control this plain intention.

The Court were unanimous that it was a tenancy in common in fee; and that the words "survivors and survivor" related to the death of the testator.

23. R. Clarke devised his estate to trustees and their heirs, to the use of the testator's nieces, Susan Clarke, Eliz. Garland, and Ann Corry, and the survivor and survivors of them, and the heirs of the body of such survivor and survivors, as tenants in common and not as joint tenants; and for want of such issue, remainder over. Garland v. Thomas, 1 Bos. & Pul N. R. 82.

Upon a case sent by the Master of the Rolls for the opinion of the Court of Common Pleas, the Judges of that Court certified that the devisees took as tenants in common.

24. It has been stated that two persons may have an estate in joint tenancy for their lives, and be tenants in common of the inheritance. These estates may be created by will, as well as by deed. Tit. 18. c. 1. § 8.

25. A person devised an estate to be sold for the payment of debts and legacies; and directed that the surplus of the money should be laid out in the purchase of lands, to be settled to the use of the testator's two nephews, and the survivor of them, and their heirs, equally to be divided between them, share and share alike. The question was, whether these words created a joint tenancy, or a tenancy in common. Barker, v. Gills, 2 P. Wms. 280. Barker v. Smith, S.C. 9 Mod. 157.

Lord King said, it was a certain rule, in the exposition of wills especially, that every word should have its effect, and not be rejected, if any construction could possibly be put upon it, and here he thought there might. The first part of the devise being to two, and the survivor of them, made them plainly joint tenants for life, and therefore they should be

so taken; and then, as to the next words—"and to their heirs equally to be divided between them, share and share alike," these were plainly words importing a tenancy in common, and should operate accordingly, so as to make them tenants in common of the inheritance; by which construction of the will every word would take place.

3 Bro. Parl. Ca. 104.

A decree was made accordingly; which was affirmed by the House of Lords.

What words create Cross Remainders.

26. With respect to the words by which cross remainders are expressly created in a will, they are of course the same as those which are used for that purpose in a deed. But cross remainders may arise in a will, by implication of law; where it appears to have been the intention of the testator that there should be cross remainders.

Clache's Case, Dyer, 303—330.

27. A. having issue five sons, his wife being ensient with the sixth, devised two-thirds of his lands to his four younger sons, and the child in *ventre matris*, if it was a son, and their heirs; and if they all died without issue male of their bodies, or any of them, that the lands should revert to the right heirs of the devisor.

It was adjudged that the younger sons were tenants in tail, with cross remainders to each of them: for it was clearly the intention of the testator that no part of the estate devised should revert to the heirs of the devisor, as long as any issue remained, of any of his younger sons.

Chadock v. Cowley, Cro. Ja. 695.

28. A man having two sons, devised part of his lands to one of them and his heirs, and the remaining part to the other and his heirs: and added this item; I will that the survivor of them shall be heir to the other, if either of them die without issue.

Adjudged that they were tenants in common in tail, with cross remainders.

29. A testator devised in these words,—"I give all my lands in M. to my two daughters, Elizabeth and Anne, and their heirs, equally to be divided between them; and in case they happen to die without issue, then I give and devise all the said lands to my nephew." Holmes v. Meynell, T. Raym. 452. 2 Show. 135.

Adjudged that the two daughters took estates tail, with cross remainders.

30. But cross remainders will not be raised between two persons without words creating a necessary implication.

31. Richard Holden devised lands to his grandson Richard Holden, and grand-daughter Ann Holden, equally to be divided, and to the heirs of their respective bodies; and for default of such issue, to another person. It was determined that there were no cross remainders between Richard and Ann Holden, because there were no express words, nor any necessary implication to raise them; for the mere words, "and for default of such issue," being relative to what went before, only meant, and for default of heirs of their respective bodies; and then it was no more than if it had been a devise of a moiety to Richard and the heirs of his body, and of the other moiety to Elizabeth and the heirs of her body, and for default of heirs of their respective bodies, remainder over; in which case there could be no doubt. Comber v. Hill, Stra. 969.

32. John Owen being seised in fee of two messuages, devised them to his wife for her life, and after her decease to his son and daughter John and Margaret, to be equally divided between them, and the several and respective issues of their bodies, and for want of such issue to his wife in fee. Lord Hardwicke Davenport v. Oldis, 1 Atk. 579.

was of opinion that this will was not so penned as to create cross remainders, which not being favoured by the law could only be raised by an implication absolutely necessary; and that was not the case here, for the words several and respective effectually disjoined the title.

Formerly not implied between more than Two.

1 Saund. 185 *a. n.* 6.

33. It was however laid down by the Judges in the reign of King Charles I., that cross remainders should not be implied between more than two persons. And the late Mr. Serjeant Williams has observed that this doctrine was established for two reasons; one was to prevent, as well the confusion which it was said would follow, from the division of an estate among many, as the uncertainty which would arise whether the surviving shares should vest in them as joint tenants or tenants in common, and for what estate; the other, which was a technical reason, was to avoid the splitting of tenures.

Gilbert v. Witty, Cro. Ja. 655.

34. A person having three sons, and being seised of three houses, devised a house to each son and his heirs; with a proviso, that if all his said children should die without issue of their bodies begotten, that then all his said messuages should remain over, and be to his wife and her heirs.

It was adjudged that these words did not create cross remainders, between the sons; but that on the death of any one of them without issue, his house should go over to his mother. And Mr. Just. Doddridge said, that although in a devise to two persons, there might be cross remainders, by implication, yet that in a devise to three, cross remainders should never be implied; on account of the uncertainty and inconvenience.

Cole v. Levingstone, 1 Vent. 224.

35. In a subsequent case Lord Hale said, that cross remainders should not be created between three

persons, unless the words of the will plainly proved the intent of the testator to have been so; as if Blackacre were devised to A., Whiteacre to B., and Greenacre to C., and if they should all die without issue of their bodies, *vel alterius eorum*, then cross remainders would be allowed.

36. A person devised to his four sisters and a niece for their lives, share and share alike, as tenants in common, and not as joint tenants, remainder to their sons successively in tail male, remainder to their daughters in tail, the reversion to his own right heirs. Perry v. White, Cowp. 777.

Lord Mansfield said, that wherever cross remainders were to be raised by implication between two, and no more, the presumption was in favour of cross remainders, where they were to be raised between more than two, there the presumption was against cross remainders; but that presumption might be answered by circumstances of plain and manifest intention either way. This was a qualification of the rule laid down in former cases; for they seemed to say that there should not be cross remainders between more than two; but the true rule was to take it with the qualification above stated. Here the presumption was against cross remainders, and judgment was given that there were no cross remainders.

37. In the case of Doe v. Cowper, which has been stated in a former chapter, Mr. Just. Lawrence observed, that the principal part of the plaintiff's argument was founded upon the raising of cross remainders by implication, between the issue of Richard Cook. But it was a settled rule that they should not be implied between more than two, unless such appeared upon the face of the will to have been the intention of the testator: but no such intent ante, c. 12. § 53.

appeared in that case, from the words of the will; nor could it be implied merely from the circumstance that the remainder over was not to take effect but upon the dying of Richard Cook without leaving issue.

This Doctrine somewhat altered. 1 Saund. 185 *a*. *n*. 6.

38. This doctrine has been somewhat altered in modern times; and it is now held, that where there are no words to sever the title, cross remainders shall be implied, and that the presumption against cross remainders, between more than two persons, may be answered by circumstances of plain intention.

Wright v. Holford, Cowp. 31.

39. A devise was in these words,—"To the use of all and every the daughter and daughters of the body of P. H., and to the heirs of her and their body and bodies lawfully issuing; such daughters, if more than one, to take as tenants in common, and not as joint tenants; and for default of such issue, to the right heirs of the devisor."

There were two daughters; and one of them having died an infant, the question was, whether her sister became entitled to her moiety. On a case being sent out of the Court of Chancery, for the opinion of the Judges of the Court of K. B., the certificate was,—"There are no words in the instrument which intimate any intention to limit over the respective shares of the two daughters dying without heirs of their bodies respectively; on the contrary the limitation over is of the whole estate limited to all the daughters, and is to take place on the express contingency of failure of all and every the daughter and daughters, and the heirs of their body and bodies; and the limitation over on default of such issue is to the heir at law. Consequently we are of opinion that as nothing is given to the heir at law, whilst any of the daughters or their issue continue, they must, among themselves, take cross remainders."

40. A person, after devising to his sons in succession for life, with remainder to the heirs male of their bodies, remainder to the heirs female of their bodies, devised to the use of all and every his daughter and daughters, as tenants in common and not as joint tenants, and to the heirs of her and their body and bodies issuing, with remainder to the heirs of his brother Abraham for ever. Lord Mansfield said, the question was, whether the intent was so plain as that it could not be effectuated without giving cross remainders; and the Court thought that it was plain and unavoidable to give cross remainders. The testator had three sons, to each of whom he gave several estates in tail. His plan was to follow the course of descent by preferring even the female line of each of his sons (in failure of the male) before his other sons and their male line, and before his own daughters. He thought the coming to his daughters a remote contingency, he therefore made use of the words, daughter and daughters; all and every; if two or more; supposing that the number might be reduced before they might become entitled. He took for granted that a remainder to his brother Abraham, who was alive when he made the will, could not take place till failure of his own issue; therefore he limited the remainder to the heirs of his brother Abraham, supposing it not likely to happen in his time. He also limited the remainder in the singular number; conceiving it could not take effect till the death of the last daughter without issue. "We think these words are equivalent to an express declaration that there shall be cross remainders. In all the limitations the female line of each son must fail, before the male line of the other sons shall take, and all must fail before the daughters could take: then it would be absurd to suppose that

Doe v. Burville, cited 2 East, R. 47.

he meant to devise over the shares of any of his own daughters dying, from the rest, when he had not done so by his sons daughters; or that he should have given to the heirs of his brother the share of one of his own daughters dying, while any of them was left: for if Abraham had no children, then the daughters would be his heirs. Therefore we think he has given all his daughters the estate, with cross remainders, as fully as if he had given them in the most express words."

Phipard v. Mansfield, Cowp. 797.

41. G. Phipard devised an estate to his brothers William and John, and his sister Elizabeth, and the heirs of their bodies, as tenants in common, and not as joint tenants; and for want of such issue, to his own right heirs for ever.

Upon a case sent out of Chancery for the opinion of the Judges of the Court of K. B., whether there were cross remainders created by the will; Lord Mansfield said, the reason given in the old cases against raising cross remainders, namely, to prevent the splitting of freeholds, had not very great weight at the time it was given, and certainly had none then. To be sure where they were to be raised between two and no more, the favourable presumption was in support of cross remainders; where between more than two, the presumption was against them; but the intention of the testator might defeat the presumption in either case. In Davenport v. Oldis, where the question was, whether cross remainders should be raised between two only, Lord Hardwicke, by way of general observation, laid it down that the words, in default of such issue, should not merely in themselves create cross remainders. But since that time, in the case of Wright v. Holford, the Court went expressly on the distinction of there being no

ante, § 32.

ante, § 39.

words, such as respectively, to sever the title; but that the limitation over being, in default of all the issues, the rule of construction laid down, as between two, should prevail. That case therefore, upon full consideration, says, that these words shall lay such a foundation as to create cross remainders; and in general he believed that in devises of this kind the intention of the testator was in favour of cross remainders; but there must be some circumstances manifesting such intention. In the present case the testator had two brothers and a sister; if he meant his estate should have gone to his heir at law, there was no occasion to make a will; therefore it was clear he did not mean his brother John should take it as his heir, or that William should do so; but he meant that his sister should be equally an object of his bounty. It was clear that he meant no division should take place, to create an inequality between them, till a failure of the heirs of all their bodies. He therefore began with a disposition thus,—"As to all my temporal estate, I give my lands to my two brothers and my sister, and to the heirs of their bodies lawfully begotten." These were the words of an ignorant man, and the will was inaccurately drawn, for there could not be a limitation to two brothers and a sister, and to the heirs of their three bodies; the Court therefore must mould them as near to the intent of the testator as they could. The lands, he said, were equally to be enjoyed by his brothers and sister, and the heirs of their bodies: it was impossible to have expressed his intention, that his sister should take equally with his brothers, more plainly. He meant his estate should continue fettered with an entail, as long as the existence of the persons then in being, and their issue; and that his heir at law

should take nothing, till after that entail was determined: whereas if the construction were to be that the heir at law should take upon the failure of issue of any one, the elder or the younger brother, as the case might happen, would then take a fee in the share of the deceased brother or sister, and so create an inequality, which the testator never intended to make. For it was limited to them and the heirs of their bodies, and for want of such issue; want of issue there plainly meant issue of all of them; how could it then be executed but by raising cross remainders. It seemed to be as strong a case as that of Wright v. Holford.

The other Judges concurred, and the Court certified that there were cross remainders.

Atherton v. Pye, 4 Term R. 710.

42. A person devised to all and every the daughter and daughters of the body of his daughter Martha, and the heirs male of the body of such daughter or daughters, equally between them; if more than one, as tenants in common, and not as joint tenants; and for and in default of such issue, he gave and devised all his said premises unto his right heirs for ever.

Upon a case sent out of Chancery for the opinion of the Judges of the Court of K. B., Lord Kenyon said, that as between two only, it should be presumed that cross remainders were intended to be raised; but if there were more than two, it was necessary to resort to other words in the will to discover an intention to raise cross remainders: but here there was no doubt, from the words of the limitation over, but that the devisor intended to raise cross remainders between the grand-daughters. The testator clearly intended that the whole should go together, whereas if no cross remainders were raised between the grand-daughters, it would go to the right heirs

by separate portions, on the death of each grand-daughter.

Mr. Just. Buller said, this was a stronger case for raising cross remainders than that of Phipard v. Mansfield; for here, besides the words, for default of such issue, namely, issue of all of them, the devise over was of *all* the testator's estates; now they could not all go together but by making cross remainders between the grand-daughters. ante, § 41.

The Court certified that the daughters of Martha took estates in tail male, with cross remainders. Staunton v. Peck, 2 Cox. R. 8.

43. It is observable that the words *several and respective* were relied upon in the cases of Comber v. Hill, and Davenport v. Oldis, to show that the limitation over was to take place upon failure of either of the daughters and their issue respectively; but, in the following case, cross remainders were raised by implication, notwithstanding the use of the word *respective*.

44. A person devised an estate to all and every the younger children of Mary Foxon, begotten or to be begotten; if more than one, equally to be divided among them, and to the heirs of their respective body and bodies, to hold as tenants in common and not as joint tenants; and if the said Mary Foxon should have only one child, then to such only child, and to the heirs of his or her body lawfully issuing; and for want of such issue, he gave and devised the said premises to C. N. Watson v. Foxon, 2 East, 36.

The question was, whether cross remainders were raised between the younger children of Mary Foxon.

Lord Kenyon said, that where cross remainders were to be raised by implication between two, and no more, the presumption was in favour of cross remainders; where they were to be raised between

more than two, the presumption was against them; but that presumption might be answered by circumstances of plain and manifest intention, either way. Whatever was declaratory of the intention of the party, he took to be expressed; no technical words were necessary to convey an intention, but if taking the whole instrument together there was no doubt of the party's meaning, the Court arrived at the conclusion. Now here the testator set out with devising all his farm, &c. to his daughter and grand-daughter for their lives, remainder after the death of the survivor, to all and every the younger children of Mary Foxon; if more than one, equally to be divided amongst them, and the heirs of their respective body and bodies, as tenants in common; and if only one child, then to such only child and the heirs of his or her body, &c.; and for want of such issue, he gave and devised the said premises to his son in law C. N. What he meant by the said premises was evident, and could not have been rendered clearer by saying *all* the said premises, though it might have served to multiply words. Then, after several limitations, and for want of such issue, he proceeded to divide the estate into thirds, to go to different persons: till then the entirety of the estate was to be preserved, and all was to go over at the same time. But great stress was laid upon the word *respective*, as disjoining the title; and the authority of Lord Hardwicke was referred to in the cases mentioned. No person regarded what fell from that great Judge with more reverence than he did; but it was unworthy of his great learning and ability to lay such stress as he was stated to have done on the word *respective*. Creating a tenancy in common divided the title as much, whether the word respective was used or not; and as

to what might have been said by other Judges with reference to the opinion delivered in Comber v. Hill, and Davenport v. Oldis; in subsequent cases, where the word *respective* did not occur, feeling themselves right on the principle on which they proceeded, it was not to be wondered at that they were desirous of relieving their own minds from the weight of Lord Hardwicke's opinion, that there was a distinction between the cases, in the omission of that word, on which he so much relied; but it was too much to infer from thence that those Judges therefore approved of his opinion, or that their judgments were governed solely by that consideration. In the case of Atherton v. Pye, the devise over, in default of such issue, was of *all* the testator's said lands; and stress was laid by some of the Judges on the word *all*, in support of raising cross remainders between the issue; he would not say by implication, but by what the Judges collected to be the intention of the testator. But the word *all* was not decisive in that case, and in truth made no difference in the sense; for a devise over of the said premises, or the premises, or all the said premises, meant exactly the same thing. Admitting therefore the general rule, that the presumption was not in favour of raising cross remainders by implication between more than two, still that was upon the supposition that nothing appeared to the contrary, from the apparent intention of the testator. He had no doubt here but that the testator intended to give cross remainders among the issue of Mary Foxon. The devise over of the premises meant all the premises; he intended that all the estate should go over at the same time. He thought Lord Mansfield's quarrel with Davenport v. Oldis was well founded, and he agreed with the cases

ante, § 42.

of Wright v. Holford, and Phipard v. Mansfield; and he could not distinguish this case from those. He was clearly of opinion that the intention of the testator was the polar star by which the Court should be guided in the construction of wills, where no law was infringed: and here the intention was clear to give cross remainders.

The other Judges concurred, and judgment was given accordingly.

Doe v. Webb, 1 Taunt. 234.

45. A person devised her estate in remainder, after giving several preceding estates, to her three daughters Frances, Mary, and Arabella, and to the heirs of their bodies respectively, as tenants in common; and in default of such issue, she gave the same to her own right heirs for ever.

The Court of C. P. held, that cross remainders were created between the three daughters; and that wherever it appeared to be the intention of a testator, that the whole of his estate should go over together, upon the failure of issue of more than two tenants in common, cross remainders shall be implied between them in the mean time, in order to effectuate that intent.

Roe v. Clayton, 6 East, 628. 1 Dow. 384.

TITLE XXXVIII.

DEVISE.

CHAP. XVI.

Construction—What words create a Condition, and make Lands liable to Debts and Legacies, and enable Persons to sell Lands.

1. *What Words create a Condition.*
4. *Where construed a Limitation.*
7. *What Words make Lands liable to Debts and Legacies.*
17. *Copyholds liable as well as Freeholds.*
20. *Legacies not preferred to specific Devises.*
22. *What Words enable Persons to sell Lands.*

Section 1.

What Words create a Condition. 1 Inst. 236 *b.*

WITH respect to the words that are necessary to make a devise conditional, it is laid down by Lord Coke that many words in a will make a condition in law, that make no condition in a deed; as a devise of lands to an executor, *ad vendendum.* So if lands be devised to one *ad solvendum* 20*l.* to J. S., or paying 20*l.* to J. N., this amounts to a condition.

Crickmore v. Paterson, Cro. Eliz. 146.

2. A person seised of lands, and having issue two daughters, devised to the eldest and her heirs, that she should pay to her younger sister yearly thirty pounds.

The question was, if this was a condition, and all the Justices held that it was; for so was the intent of the devisor; and otherwise the younger sister had no remedy for the rent. Wray and Gawdy held, that

if the words were, paying thirty pounds to her sister, this clearly was a condition; and so *ea intentione*, or *ad effectum;* and the testator's intent appearing, the law should so adjudge it; and the younger daughter might enter into the moiety.

Tit. 32. c. 24. § 11.

3. It has been already observed, that even in a deed there were no precise technical words required to make a condition precedent or subsequent: a rule which may be applied more generally and fully to the case of a will. And it has been also stated, in a preceding title, that in general adverbs of time are construed only to denote the period when an estate in remainder is to vest in interest, and do not create a condition precedent; and all the cases on this point will be found there.

Tit. 16. c. 1. Doe v. Lea, § 79. 3 Term R. 41.

Where construed a Limitation. Tit. 16. c. 2. § 29.

4. In consequence of the doctrine that no person but the heir can enter for a condition broken, it has been long established that a devise to the heir upon a condition will be construed a limitation.

Wellock v. Hammond, Cro. Eliz. 204. 3 Rep. 20 *b.*

5. A person devised his land to his eldest son, paying to his daughter and to each of his other sons 40 shillings within two years after his death.

It was resolved, that though in a will the word *paying* would create a condition, yet in this case the law would construe it to create a limitation; for if it should be held a condition, then it would descend on the eldest son, and it would be at his pleasure whether his sister or brothers should be paid or not, and therefore it must be considered the same as if the devise had been to the eldest son till he made default in payment of the sums given to the sister and brothers.

Curteis v. Wolverston, Cro. Ja. 56.

6. A person devised his estate to his second son in fee, upon condition to pay to his four daughters 20*l.* each at their full age. This was held to be a

condition; for it should be expounded according to the common law, where it was not necessary to expound it to the contrary. But where a devise was to an eldest son, upon such a condition, if it should be expounded to be a condition, it would be void, and to no purpose; for it would descend upon the eldest son, and no remedy could be had against him.

What Words make Lands liable to Debts and Legacies.

7. By the common law real estates are not subject to the payment of debts due on simple contract, unless made so by will; which is considered by many as a great defect, because credit is in fact given to the possessors of landed estates, in proportion to the value of such estates. He, therefore, who neglects to charge his lands with the payment of his debts, sins, as it has been emphatically said, in his grave: and if he omits this circumstance, on purpose to defeat the demands of his creditors, he dies with a deliberate fraud in his heart.

8. These principles have given rise to a rule, both at law and in equity, that whenever a testator expresses an intention that all his debts shall be paid; or devises all his property, subject to the payment of his debts; his real estate shall be charged with the payment of his debts, by simple contract.

Bowdler v. Smith, Prec. in Cha. 264.

9. A person devised in these words:—"As to my temporal estate wherewith God has blessed me, I give and dispose thereof as followeth—First, I will that all my debts be justly paid, which I shall at my death owe, or stand indebted in, to any person or persons whatsoever. Also I devise all my estate in G. to A. B." And this was all the estate the testator had.

Tompkins v. Tompkins, Id. 398. S.P.

The Court held, that this will created a charge on the real estate, for payment of debts.

Trott v. Vernon, Prec. in Cha. 430.

10. A person being seised of a real estate, and also possessed of some personal estate, made his will in writing, and thereby devised in these words,—"*Imprimis*, I will and devise that all my debts, legacies, and funerals shall be paid and satisfied, in the first place."

It was held, that this clause amounted to a charge on his real estate, for the payment of debts and legacies.

Beachcroft v. Beachcroft, 2 Vern. 690.

11. A will began with these words:—"As to all my worldly estate, my debts being first satisfied, I devise the same as follows, &c."

The Court held it clear in this case, that no land, nor any part of the testator's worldly estate, was devised, till after his debts paid; consequently that the land was charged: and that it would have been sufficient, though the word *first* had been omitted.

Harris v. Ingledew, 3 P. Wms. 91. S.P.

Legh v. Warrington, 1 Bro. Parl. Ca. 511.

12. A will began in these words:—"As to my worldly estate which it hath pleased God to bestow upon me, I give and dispose thereof in manner following, (that is to say,) *imprimis*, I will that all my debts, which I shall owe at the time of my decease, be discharged and paid."

Hatton v. Nichol, Forrest, 110.

It was decreed by Lord King, that these words made the lands of the devisor liable to his debts.

Williams v. Chitty, 3 Ves. 545.

And this decree was affirmed in the House of Lords.

Shallcross v. Finden, Id. 738.

13. A testator may charge only a certain part of his real property with the payment of his debts, and not the whole.

Thomas v. Brittnell, 2 Ves. 313.

14. John Ivy, reciting that he had made a former will in the life of his wife, in which he had given her all his real and personal estate; that he had the misfortune to lose her, and therefore he made his will for the disposition of the same. First, he ordered all his debts and funeral charges to be honourably paid

after his decease. In a subsequent clause he devised particular premises, enumerating them, excepting H. and R.; all which enumerated lands, except H. and R., he devised to trustees, by and out of the money arising by sale, and out of the rents and profits thereof, in the mean time, in the first place, to pay and discharge his debts, funeral expences, and all legacies given by his will, or by other writing under his hand. He afterwards went on and said that H. and R. should be in the first place for payment of the legacies mentioned in his will.

On a bill by the creditors to have the real estate by the will subjected to the payment of their debts, in aid of the personal, so far as that proved deficient; insisting that the whole real estate was by the will established as a fund for payment of debts. And whether the whole or any part of the real estate was subject to debts, was the question.

Sir J. Strange, M. R. said, the word *same* must relate to the real and personal estate before given; and if it stood on that, and the word *first*, only, he should have no doubt but that his whole real estate would be subject to the payment of debts; not from any express mention made that they should be a charge on his real estate, but from that construction the Court makes for the benefit of creditors; and that men should not sin in their graves. Here was no express declaration on the outset of the will that the testator's whole real estate should be charged with payment of his debts; therefore it was necessary to look farther into his will, and see what was the intent of the testator, who was not bound in fact, though bound in honour, to make such a disposition for his creditors. Considering the whole, he had subjected the greatest, but not every part of his

real estate, to the payment of his debts; having excepted a particular part, and applied it to another purpose, not intending that H. and R. should be liable to be swallowed up by creditors, to the prevention of the legatees under the will: but afterwards directed what should be done with H. and R. He had personal estate, which he could not exempt from payment of his debts; he had real, the whole of which he might subject; in declaring his intent as to that, he exempted H. and R. entirely, reserving them as a fund for legacies only. On the clauses therefore altogether, and which were only clauses by which he expressly charged his land therewith; he considered how far his real estate should be chargeable to creditors; and then thought himself at liberty to apply the other part to satisfy legatees. Therefore though on the first part, the Court might take the whole real to be charged with debts, yet as there was no express lien on the real, by these general words, and afterwards he distributed such part of his real for debts, and such for legacies; it was too much to lay hold on the general words, to say the whole should be charged with payment of debts. It could only be done by implication on the general words, which might be explained afterwards, and that implication destroyed: consequently the plaintiffs could only have a decree for an account of the personal estate, and then the other parts of the real estate, except H. and R., for payment of their debts.

15. But unless the intention to exempt a particular part of the real estate be very clear, the whole will be subject.

Ellison v. Aircy, 2 Ves. 568.

16. T. Nichols by his will charged all his personal estate with debts and legacies; and so much as the personal estate should fall short to answer and pay,

he charged all his messuages, lands, and grounds in Durham, with payment thereof, in aid of the personal estate, and directed the personal to be sold. By a subsequent clause he gave a particular farm to be sold, for payment of his debts and legacies; and by another clause, devised all his real estate so charged and chargeable to trustees, to receive and take the first two years profits, that should arise and become payable out of his estate in Durham, for payment of his debts and legacies, if the personal estate proved deficient.

It was contended that only that particular part, and the two years' profits, were charged; the generality of the first charge being controuled and restrained thereto by express words.

Lord Hardwicke said, that upon all the rules of charging for payment of debts and legacies, the charge of the personal estate therewith was unnecessary. Afterwards there was a full and complete charge on the real, of so much as the personal proved not sufficient to satisfy. It must be something very strong in the will to restrain that charge to a particular part, to go no further. If it rested on the clause which gave the farm, would the express direction of the will to sell a particular estate, towards payment of those debts and legacies that the personal was not sufficient for, afford a negative implication that no more should be sold? certainly not. For there were several cases where there was a charge for payment of debts, and afterwards a direction that a particular part should be sold: that had been taken only to be a declaration that they should be first applied. Then the subsequent part was no more than what was done by the former clause, taking out a particular part; as one was of the inheritance, the

other the profits. If indeed negative words were added, it could not go further; but he took those negative words, *and no more*, to be applied to the maintenance. There were several cases of a general charge, by words not nearly so strong as here, and a devise afterwards of a particular estate for that purpose, yet that was not sufficient to restrain it. This general charge then subsisted; and he could not make any other construction.

Vide 2 Ves. 272. Foster v. Cook, 3 Bro. R. 350.

17. A devise in trust for payment of debts does not revive a debt upon which the statute of limitations had taken effect, by the expiration of the time, before the testator's death.

Burke v. Jones, 2 Ves. & Beam, 275.

18. In all cases of this kind, customary and copyhold lands will be applied in payment of debts as well as freeholds.

Copyholds liable as well as Freeholds.

19. T. Penneck declared by his will that all his debts and funeral expences should be first paid and satisfied.

The question was, whether certain customary lands held of the duchy of Cornwall, which had been mentioned in the will, in distinct parts from the rest of the fee simple lands, were subject to debts; the testator having surrendered those lands to B. P., who declared a trust thereof by deed, for several persons, and for the use of such as the testator should appoint.

Lord Hardwicke said, he was satisfied that by the will these lands were subject to debts.

Godolphin v. Penneck, 2 Ves. 271.

20. A question arose, whether in failure of the personal estate, copyhold lands were liable to debts, under the common commencement of a will:—"As to all my worldly estate, I desire all my just debts should be first paid."

Coombes v. Gibson, 1 Bro. R. 273.

Lord Commissioner Ashurst said, the doctrine was, that where the introductory words made the real estate liable, it should extend as well to the copyhold as to the freehold lands. The freehold

was as unnatural a fund for the payment of debts as the copyhold. It was admitted that if there had been no freehold, the copyhold would have been liable. If the freehold had been devised to one person, and the copyhold to another, the freehold might have been first applied. But he was clearly of opinion they were both liable.

Lord C. Hotham said, if the copyhold was charged by the will, there was nothing in the case to discharge it. The law followed the testator's intention, to apply the whole real estate to the payment of debts; which covered the copyhold as well as the freehold.

Legacies not preferred to specific Devises.

21. A clause in a will, directing the payment of all the debts and legacies, is not alone sufficient to charge legacies on real estates specifically devised; for there the intention must be clearly expressed.

Kightley v. Kightley, 2 Ves. junr. 328.

22. Thus where a testator *first* directed that all his debts, legacies, and funeral expences should be fully paid and discharged; and afterwards devised two freehold estates specifically to two persons and gave some legacies; the question was, whether the legatees were entitled to have the devised estates sold for payment of their legacies.

Sir R. P. Arden, M. R. said, it had been contended, that where a testator had charged his real estate by will, both debts and legacies should take place of every other disposition. That the legacies should stand in the same place as debts, and that there was no reason why they should not have the same preference. The principle, however, was perfectly different, the one being purely voluntary, the other obligatory. Wherever a man made a will, he was supposed to do that which conscience obliged him

to do; and if he showed an intention that his debts should take place of every other disposition, and that he meant they should be paid, the Court would strictly enforce that intention. The same principle would not apply to legacies. The estate contended to be charged was specifically devised, and he could not see any reason why pecuniary legacies should have any preference to such specific devises. If he was to direct these legacies to be so raised and paid, it would be giving them that undue preference.

Vide 3 Ves. 551.

What Words enable Persons to sell Lands. Lit. § 169.

23. Littleton says, that where a person had a power, by the custom, of devising his lands, he might devise that his executors might alien and sell them for a certain sum, to distribute for his soul. In this case though the devisor died seised of the tenements, which descended to his heir, yet the executors might sell the tenements so devised to them, and put out the heir, and thereof make a feoffment, alienation, and estate by deed. And Lord Coke observes, that the feoffee shall be in by the devisor.

1 Inst. 113*a*.

Idem.

24 From this doctrine arose a custom for testators to direct that their executors should sell their lands for payment of their debts; or to devise their lands to their executors for that purpose. In the latter case, the lands vest in the executors; but in the former, they have only a bare authority. And it being formerly held, that if one executor refused to join, the others could not sell, it was enacted by the stat. 21 Hen. VIII., that where lands were willed to be sold by executors, though some of them refused, yet the rest might sell. And though the letter of the law extended only where executors had power to sell, yet being a beneficial act, it was by construction ex-

Bonifaut v. Greenfield, Cro. Eliz. 80.

Fearne's Opin. 222.

tended to the case of lands devised to executors to be sold.*

25. It has been doubted whether a power of sale, given to executors, be capable of survivorship or transmission. But Mr. Hargrave observes, that this question is now of little consequence; for such a power, though extinct at law, would certainly be enforced in equity; which rightly deeming the purpose for which the testator directs the money arising from the sale to be applied, to be the substantial part of the devise, and the persons named to execute the power of selling, to be mere trustees, the case fell within the general rule of equity, that a trust shall never fail of execution for want of a trustee; and that if one is wanting, the Court will execute the office. 1 Inst. 113 *a.* n. 2. Tit. 12. c. 1. § 91.

26. It has been stated that where a man devises his lands to his executors, for payment of his debts, and until his debts are paid; although the determination of such estates be uncertain, yet it is a chattel interest, transmissible to their executors. Tit. 8. § 7.

27. Any words, from which it can be inferred to have been the intention of the testator that his lands should be sold for payment of his debts, will operate as a power of sale.

28. A person having surrendered his copyhold lands to the use of his will, devised in these words:— "My debts and legacies being first deducted, I devise all my estate real and personal to J. S." Newman v. Johnson, 1 Vern. 45.

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* It is said by Littleton, § 169., that in the case of an authority to sell, the executors may make a feoffment, alienation, and estate, by deed, or without deed. The reason is, that the purchaser is in by the devisor; the executors having a mere right of nomination. Vide Vin. Ab. Tit. Authority, B.

It was decreed by Lord Nottingham that these words amounted to a devise to sell, for the payment of debts.

Bateman v. Bateman, 1 Atk. 421.

29. R. Bateman by his will, taking notice that he had surrendered a copyhold estate to the use thereof, directed that the said copyhold should remain, one third to his wife for life, and the other two thirds to his son, paying to his two daughters 150 *l.* a-piece at twenty-one; but by a latter clause in the will he said, "Provided that if my personal estate and my house and lands at W. should not pay my debts, then my executors to raise the same out of my said copyhold premises."

Lord Hardwicke said, the question was, whether the latter devise would entitle the executors to sell the copyhold estates; and he was of opinion it would: for as the rents were not near enough to discharge the testator's debts, these words would give the trustees a power to sell, to satisfy the testator's intention of paying his debts. It was therefore decreed that the copyhold estate should be sold.

Bath v. Bradford, 2 Ves. 587.

30. In a subsequent case, where a testator had created a trust for payment of debts, Lord Hardwicke said, that the trustees might raise the money by mortgage or sale, without the assistance of the Court of Chancery; that it was common for trustees to do so, and that Court, if it came before them afterwards, had always supported it.

Lancaster v. Thornton, 2 Burr. 1027.

31. G. Lancaster, being seised in fee of some lands, and possessed of others for a term of years, made his will; and after giving certain legacies, proceeded thus:—"I do hereby charge and make chargeable all and every my lands and inheritance, and leasehold, with the payment of my debts, funeral expences, and legacies; and for more speedily raising money for

payment of them, I devise to G. E. and D. Lancaster (who were his two sons and daughter,) their heirs, executors, and administrators, the leasehold estate," describing it, for all the residue of the term, upon trust to sell the same, and to apply the money to the payment of his debts, &c. But in case the money arising from the sale of the leasehold estates should not be sufficient to pay and discharge all his debts; then he devised — "that his said two sons and daughter should and might absolutely sell, mortgage, or otherwise dispose of his freehold estate, for the payment of such of his said debts, &c. as his said leasehold estate should not be sufficient to discharge." And appointed his two sons and daughter executors.

The leasehold estate was not sufficient to pay the testator's debts, legacies, and funeral expences.

Lord Keeper Henley directed a case to be sent for the opinion of the Judges of the Court of K. B. whether any estate passed to the two sons and daughter of the testator; or only a power to sell.

Lord Mansfield said, there were no words by which the estate was devised to the executors; therefore if it were construed that there was a devise to them, it must be raised by implication: but by the frame of the will it was plain that the testator did not so intend; for he showed, by the expression he had used, that he knew the distinction between the devise of an estate to them, and giving them only a power to sell; as to the term *devise*, the expression, I devise, was here synonymous to saying, *I will*, or *my mind is*.

The intention of the testator (it was said) could not be complied with in this case, without an implication of a devise to the executors; because it must otherwise descend to the heir at law, in the mean

time, who would not be chargeable with the intermediate rents and profits, but altogether unaccountable for them; that clearly was not so. The land could only descend to the heir, subject to the charges; and would be liable in his hands to the payment of debts, legacies, and funeral expences. So that the testator's intention was equally answered one way as the other.

The certificate was as follows—"Having heard counsel on both sides, and considered this case, we are of opinion that no estate passed to the said Edmund, George, and Dorothy Lancaster; but only a power to sell, demise, mortgage, or otherwise dispose of the premises."

Denne v. Bowyer, 11 East. 288.

32. It was held by the Court of K. B. in a modern case that where one devised lands to five persons in trust to sell, and to apply the money to certain uses, and afterwards made the same persons executors; they did not take the lands as executors; but as devisees in trust.

1 Inst. 237 *a.* 265 *b.* Willis v. Shorrall, Tit. 35. c. 10. § 61.

33. Where powers of this kind are given to strangers they cannot be extinguished, either by the persons to whom they are given or by those who are in possession of the land.

ante, c. 1. § 15.

34. It has been stated in a former chapter, that devises of land are fraudulent as against creditors. But devises for payment of debts are notwithstanding valid.

Tit. 12. c. 4. § 15.

35. The cases in which purchasers from devisees or executors are bound to see to the application of the purchase money, have been already stated.

TITLE XXXVIII.

DEVISE.

CHAP. XVII.

Executory Devises.—Devise over after a Devise in Fee Simple.

1. *Origin of Executory Devises.*
2. *Devise over after a Devise in Fee.*
9. *Though the First Estate be not vested.*
11. *No Devise is Executory which can be supported as a Remainder.*
14. *An Executory Devise cannot be barred.*
17. *Within what Time an Executory Devise must vest.*
23. *A Devise after a general failure of Heirs or Issue is too remote.*
24. *Unless restrained.*
27. *Curtesy attaches on the First Estate.*

Section 1.

Origin of Executory Devises.

IT has been stated that by the rules of the common law, no remainder could be limited over after a limitation in fee simple; nor a freehold be created to commence *in futuro*. But the indulgence shown to testators in effectuating their intentions, however untechnically expressed, induced the Judges to dispense with those rules, in cases of wills, as well as in the limitation of uses; and also to allow of similar dispositions of terms for years, in wills, and in deeds declaring the trusts of such terms.

Tilbury v. Barbut, 3 Atk. 617.

Devise over after a Devise in Fee.

2. Dispositions of this nature are called Executory Devises; and are of three sorts. The first is, where

the devisor disposes of the whole fee; but upon some future contingency qualifies that disposition, and devises the estate over to some other person.

Anon. Dyer, 127 *a.* in marg.

3. A testator devised to his mother for life, and after her death to his brother in fee; provided that if his wife, who was then ensient, was delivered of a son, then the land should remain to him in fee. A son was born; and it was held that the fee of the brother should cease, and vest in the son, by way of executory devise.

Hoe v. Gerils, Palm. 136.

4. A person devised to A. and his heirs; provided that if he died within age, then the land should remain to B. and his heirs. Adjudged good. For when the devisee only takes a limited estate, a contingent fee may depend upon it; but that was not by way of remainder, but executory devise. And this doctrine was fully established in the following case.

Pells v. Brown, Cro. Ja. 590.

5. W. Brown devised lands to Thomas Brown his second son, and his heirs for ever; and if Thomas died without issue, living William his brother, that then William his brother should have those lands to him and his heirs and assigns for ever.

All the Judges agreed that this was a good limitation of the fee to William, upon that contingency; not by way of immediate remainder, for they all agreed that it could not be by remainder. As if one devised land to A. and his heirs, and if he died without heir, that it should remain to another, it was void and repugnant to the estate: for one fee could not be in remainder after another; for the law doth not expect the determination of a fee by the tenant's dying without heirs, and therefore cannot appoint a remainder to begin upon the determination thereof; but by way of contingency or of executory devise to another, to determine the one estate, and

limit it to another, upon an act to be performed; or in failure of performance thereof, &c. For the one might be, and had always been allowed.

6. A. having two sons, B. and C., by several venters, and being seised of Blackacre and Whiteacre, devised Blackacre in fee to B., and Whiteacre to C. in fee; with a proviso that if it should please God either of his said sons to die before such time as they should be married, or before they should attain to their age of 21 years, and without issue of their bodies to be begotten, then he gave all the said lands, which he had given by his will unto such of his sons as should so decease before his marriage, or before his age of 21, and without issue of his body, unto the survivor of his sons.

Hanbury v. Cockerill, 1 Roll. Ab. 835.

Goodtitle v. Wood. Willes R. 211.

The devise over was held good, as an executory devise.

Frogmorton v. Holyday, ante, c. 11. § 73.

7. A person devised to his son William Heath, all his estate, till Edward Heath should attain his age of 22 years, and no longer. He afterwards said,—"*Item*, I give and bequeath to Edward Heath all my messuages in H. and C. for ever, that is, if he have a son or sons who shall attain 21. But if my kinsman Edward Heath should chance to die without son or sons to inherit, my will is that the son of my son William Heath shall inherit."

Heath v. Heath, 1 Bro. R. 147.

It was determined by Lord Thurlow, that Edward Heath took an estate in fee, subject to an executory devise over, in the event of his dying without issue, or of his issue dying under the age of 21 years.

8. A person devised a copyhold estate to his daughter Susan Saunders, and her heirs and assigns for ever; but if his said daughter should happen to die, leaving no child or children, or lawful issue of her body, living at the time of her death, then he

Doe v. Witton, 2 Bos. & Pul. 324.

gave, devised, and bequeathed all the said copyhold premises to T. B. and his heirs.

Lord Eldon and the other Judges of the Court of Common Pleas held that the whole fee being given to Susan Saunders, her heirs and assigns, no farther remainder over could be limited upon that fee; and therefore the estate given to T. B. was a new fee limited upon a contingency, that is, an executory devise.

Right v. Day, 16 East. 399.

Though the first Estate be not vested.

9. Where there is a devise over, after a devise in fee simple, though such an antecedent devise in fee be not vested, but contingent; yet if the ulterior devise is limited so as to take effect in defeazance of the estate first devised, on an event subsequent to its becoming vested, it will be deemed an executory devise.

Gulliver v. Wicket, 1 Wils. R. 105.

10. A person devised lands to his wife for life, and after her death, to such child as she was then supposed to be ensient with, and to the heirs of such child for ever; provided that if such child as should happen to be born should die before the age of 21 years, leaving no issue of its body, the reversion should go to another.

Lord Ch. J. Lee delivered the opinion of the Court, that the true construction of the will was, that there was a good devise to the wife for life, with a contingent remainder to the child in fee; and a devise over, which was good as an executory devise; and if the contingency of a child never happened, then the last devise was to take effect, upon the death of the wife.

No Devise is Executory which can be supported as a Remainder.

11. An executory devise being a disposition contrary to the rules established for the construction of conveyances at common law; whenever a future interest in land is so devised, as to fall within the

rules laid down for the limitation of contingent remainders, such devise will be construed to be a contingent remainder, and not an executory devise.

12. Thus wherever an estate is devised to a person and his heirs, with a limitation over in default of issue, it is construed to be an estate tail; and the limitation over is a remainder, to take effect on the determination of the estate tail. But if the limitation over be directed to take place on an event which may happen during the continuance of the estate tail, it is an executory devise; for it cannot be a remainder, because the event on which a remainder is limited must not operate so as to abridge or determine the particular estate. So that in the case of Pells v. Brown, if the words, 'living William his brother,' had been omitted, it would clearly have been an estate tail in Thomas, with a remainder over to William, to take effect on the expiration of the preceding estate tail.

ante, c. 12. § 12.

Tit. 16. c. 2. § 16.

3 Term R. 145.

13. It follows, that where there is a devise over after a preceding devise to a person and his heirs; if there are any words in the will, by which the first devise can be restrained to mean heirs of the body only, the first estate will be construed to be an estate tail, and the devise over a remainder.

14. The essential difference between a contingent remainder and an executory devise, is, that the first may be barred or destroyed by several means; but an executory devise cannot be prevented from taking effect, either by fine or recovery; or by any alteration whatever in the estate after which it is limited.

An Executory Devise cannot be barred.

Tit. 16. c. 6. Fearne Ex. Dev. 4th ed. 67. note.

15. Thus in the case of Pells v. Brown, Thomas entered on the estate devised to him, and suffered a common recovery; but all the Judges, except Doderidge, held that the recovery did not bar the

ante, § 5.

executory devise; for Thomas, the person who suffered the recovery, had a fee; and William Browne had but a possibility, if he survived Thomas; and Thomas dying without issue in his life, no recovery in value should enure thereto, unless he had been party by way of vouchee.

Mullinix's case, Palmer, 136.

16. A person granted several annuities, by deed, to his younger children; and afterwards devised all his lands to his elder son and his heirs, upon condition that he paid the annuities; and if he failed of payment, that the younger son should enter and have them. The elder son entered, and made a feoffment; and then the younger son entered for non-payment. It was held that this entry was lawful, the contingent estate not being divested by the feoffment.

Within what time an Executory Devise must vest.

17. In consequence of the rule that an executory devise cannot be barred, or prevented from taking effect, by any mode whatever, it became necessary to prescribe certain bounds and limits to executory devises; lest they should be used as a means of creating perpetuities. And therefore it was established, by analogy to the case of strict settlements, that an executory devise must vest within the compass of a life or lives in being, and twenty-one years and nine months after; and the Courts have uniformly supported executory devises that are restrained within these limits.

Tit. 32. c. 23. § 18.

18. Thus in the case of Pells v. Brown, the event on which the estate was devised over, namely, the death of Thomas without issue in the lifetime of William, being confined to the life of William, was held good.

Fairfax v. Heron, Prec. in Cha. 67.

19. A person devised all his lands, after the death of his executor, to A. and his heirs for ever; but if he died leaving no son, then to that son or sons of

his executor which his executor should think fit to nominate.

Lord Keeper Somers decreed that this was a good executory devise; because the contingency was confined to the period of a life in being.

20. R. Ben having a sister who had been formerly married to one Smith, by whom she had issue Augusta Smith; and afterwards married one Wharton, by whom she had issue a son called Benjamin and a daughter called Mary; devised his estate to his sister Elizabeth, for so long time and until her son Benjamin Wharton should attain his full age of 21 years, and after he attained that age then to the said Benjamin and his heirs for ever; and if he died before his age of 21 years, then to the heirs of the body of Robert Wharton, and to their heirs for ever, as they should attain their age of 21 years. The testator died; Benjamin died before he attained the age of 21, living Robert his Father; and afterwards Robert died. Taylor v. Biddall, 2 Mod. 289.

It was determined that the executory devise to the heirs of the body of Robert Wharton was good. Now the heirs of the body of Robert Wharton could not take until after their father's death; for *nemo est hæres viventis:* and since that heir of the body of Robert who should attain 21, might not have been born before his father's death, and the estate could not vest in him until he attained 21, it follows that the estate might possibly not have vested under that limitation until twenty-one years after the determination of a life then in being.

21. Sir W. Stephens devised freehold estates to his grandson William Stephens, his heirs and assigns for ever; but in case his said grandson W. Stephens should die before he attained his age of 21 years, Stephens v. Stephens, Forrest. 228.

then he gave the same to his grandson Thomas Stephens, his heirs and assigns for ever; but in case his grandson Thomas Stephens should depart this life before he attained his age of 21 years, then he devised the said lands to such other son of the body of his daughter Mary Stephens as should happen to attain the age of 21 years, his heirs and assigns for ever; the elder of such sons to take before the younger, &c.; and to the several and respective heirs male of the body of such son and sons, and the heirs male of the body of his and their body and bodies. And for default of such issue, he gave the said lands to all and every the daughter and daughters of the said Mary Stephens in tail male; and for want of such issue, he devised the said lands to his brother Sir Richard Stephens, his heirs and assigns for ever.

The testator died leaving William and Thomas Stephens, his two grandsons, who both died under age. Soon after the death of the testator, Mary Stephens had another son, who attained the age of 21 years; and the question was, whether this executory devise to such unborn son of Mary Stephens, as should attain the age of 21 years, was good.

Lord Talbot directed a case to be sent to the Court of King's Bench, and the Judges of that Court, Lord Hardwicke, and Justices Page, Probyn, and Lee, certified their opinion that they did not find any case wherein an executory devise of a freehold had been held good, which had suspended the vesting of the estate till a son unborn should attain his age of 21 years, except the case of Taylor v. Biddall; and having caused the record to be searched, they found it agree in the material parts with the printed report. And therefore, however unwilling they might be to extend executory devises beyond the rules generally

aid down by their predecessors, yet upon the authority of that judgment, and in conformity to several late determinations, in cases of terms for years, and considering that the power of alienation would not be restrained longer than the law would restrain it, viz. during the infancy of the first taker, which could not reasonably be said to extend to a perpetuity, and that this construction would make the testator's whole disposition take effect, which otherwise would be defeated; they were therefore of opinion that the devise before mentioned might be good, by way of executory devise.

Long v. Blackall, infra, c. 19.

22. In a case which will be stated hereafter it was held that a devise to an infant *in ventre matris*, with limitation over upon failure of issue of his body at the time of his death, was good, which began with an allowance for the birth of a posthumous child, and might also conclude with it.

A Devise after a general failure of Heirs or Issue is too remote.

23. But where an executory devise is limited on an event which may not happen within the period above mentioned, as upon a general failure of heirs, or issue; it is void. Nor is it material in such cases how the fact actually turns out; for the possibility, at the creation of such executory limitation, that the event on which its existence depends, may exceed, in point of time, the limits allowed, vitiates it *ab initio*.

Unless restrained.

24. But where the generality of the word heirs, or issue, is restrained by any other words, to the period allowed, the devise over will be good. Thus a devise over after a devise to a person and his heirs, in case the first devisee shall happen to die, leaving no issue behind him, has been held good; these words being construed to mean, having no issue living at the time of the person's death.

Porter v. Bradley, 3 Term R. 143.

25. A person devised a real estate in the following words—"*Item*, I give and devise unto my son P. D. his heirs and assigns for ever, all that messuage and tenement wherein I now live. But my will is, that in case my son P. D. shall happen to die leaving no issue *behind* him, then my said wife shall receive and take the rents and profits thereof."

On a case sent from the Court of Chancery to the Court of K. B. one of the questions was, what estate C. D. took under this will.

Lord Kenyon and the other Judges were of opinion that this case was not to be distinguished in principle from that of Pells v. Brown; and certified in the following words:—"Having heard counsel in the case above referred to us, we are of opinion that P. D. took an estate in fee simple in the premises above devised to him. But as P. D. died without issue living at the time of his death, we are of opinion that the further disposition made by the testator in that event, is good by way of executory devise."

Roe v. Jeffery, 7 Term R. 589.

26. A person devised a dwelling house to his grandson T. Triswell and his heirs for ever. But in case his said grandson should depart this life, and *leave* no issue, then his will was that the said dwelling house, &c. should be and return to E. M. and S., or the survivors or survivor of them.

Lord Kenyon said, nothing could be clearer in point of law, than that if an estate were given to A. in fee; and by way of executory devise, an estate was given over, which might take place within a life or lives in being, and twenty-one years and the fraction of a year after; the latter was good, by way of executory devise. The question therefore in this and similar cases was, whether from the whole context of the will it could be collected that, when an estate

was given to A. and his heirs for ever, but if he died without issue, then over; the testator meant dying without issue living at the death of the first taker. That the rule was settled so long ago as in the reign of James I., in the case of Pells v. Brown: that case had never been questioned or shaken, but had been adverted to as an authority in every subsequent case respecting executory devises. It was considered as a cardinal point on this head of the law, and could not be departed from without doing as much violence to the established law of the land as (it was supposed by the defendant's counsel) the Court would do, if they decided this case against him. ante, § 5.

On looking through the whole of the will, the Court had no doubt the testator meant that the dying without issue should be confined to a failure of issue at the death of the first taker; for the persons to whom it was given over were then in existence, and life estates only given to them. Taking all this into consideration together, it was impossible not to see that the failure of issue intended by the testator, was to be, a failure of issue at the death of the first taker; and if so, the rule of law was not to be controverted; it was merely a question of intention, and the Court was clearly of opinion that there was no doubt about the testator's intention.

27. In the case of a devise in fee, with an executory devise over, it has been lately held that a right to curtesy attaches on the first estate, and is not defeated by its determination. Curtesy attaches on the first Estate.

28. Joseph Sutton devised to trustees and their heirs, in trust to apply the rents for the maintenance and education of his grand-daughter Mary Barrs, till she should arrive at the age of 21 years, or be married; and from and after the said Mary Barrs Buckworth v. Thirkell, Collect. Jur. vol. 1. 332. 3 Bos. & Pul. 658.

should be married, he gave the said lands to the said Mary Barrs, her heirs and assigns for ever; but in case the said Mary Barrs should die before she attained the age of 21 years, and without leaving issue, then from and after the decease of the said Mary Barrs as aforesaid, he gave and devised the said estates to his grandson. Mary Barrs married Solomon Hanford, and had a child who died in her lifetime; she died soon after, being under the age of 21 years, and without leaving any issue. Solomon Hanford the husband received the rents of the estate during the coverture in right of his wife.

A question was reserved for the opinion of Court on this case, whether Hanford was entitled to be tenant by the curtesy.

Lord Mansfield said, the right of tenant by the curtesy existed at the common law; and the necessary points were, that the wife be seised of an estate of inheritance, which by possibility might descend to her issue, and that issue should be born. Estates at common law were either absolute or conditional; curtesy was incident to both, and existed when the wife died without issue inheritable, which let in the reverter. As to fees conditional, the estate did not become absolute by the birth of a child inheritable, but in odium of perpetuities, it was for a special purpose become absolute, if issue were born; that is, the donee might alien; but the estate was to descend and revert, according to the entail, if not aliened. At common law the only modification of estates expressly limited was by condition; the statute of uses introduced more qualifications of estates, expressly limited. About the reign of Elizabeth and James I. many cases in odium of perpetuities were determined, to prevent and defeat such an application of the

statute of uses. The Courts leaned against contingent limitations over; but having gone a great way on that side, they began to think they went too far. New devices were contrived at the time of the troubles, and practised after the restoration, such as trustees to preserve contingent remainders, and executory devises. It was not long that the bounds of them had been settled: it was in his time that the courts first held they might wait during a life in being, and twenty-one years after. Now it was contended that this was a conditional limitation: it was no such thing, there was no condition in it; it was a contingent limitation. If it was a limitation it did not defeat the right of the husband to be tenant by the curtesy; the husband might be tenant by the curtesy though the estate was spent. But how was it when she was alive; here the wife was seised in fee simple during her life, and such an one as the issue might inherit, if they had not been disappointed by death.

Judgment was given that Hanford was entitled to be tenant by the curtesy.

Vide 1 Inst. 241 a. n.

TITLE XXXVIII.

DEVISE.

CHAP. XVIII.

Executory Devises—Devise of a Freehold Estate to commence in futuro.

1. *Devise of a Freehold to commence* in futuro.
6. *Devises of this sort sometimes supported as Remainders.*
13. *Must vest within the time prescribed above.*
18. *A Devise after a general Failure of Heirs or Issue is too remote.*
22. *Exceptions—*1*st. A Devise of a Reversion.*
26. 2*d. A Devise in default of Issue of the Devisor.*
30. 3*d. A Devise over for Life on Failure of Issue.*
31. 4*th. Where an Estate Tail is raised by Implication.*

Section 1.

Devise of a Freehold to commence in futuro. Fearne Ex. Dev. 17. 23.

THE second sort of executory devise is where the devisor, without departing with the immediate fee, gives a future estate of freehold, to arise either upon a contingency, or at a period certain, unpreceded by, or not having the requisite connexion with, any immediate freehold, to give it effect as a remainder.

Pay's case, Cro. Eliz. 878. Forrest. 48.

2. Thus where a person devised lands to J. S. for five years, to commence at the next Michaelmas after the death of the testator; remainder to C. and his heirs. The testator died before Michaelmas. It was

agreed that the devise over was good as an executory devise.

3. So where A. devised lands to B. in fee, to commence and take effect six months after the testator's death; this was adjudged to be a good executory devise. Clarke v. Smith, 1 Lutw. 798.

4. A devise to an infant in *ventre matris*, is an executory devise of this kind; as it necessarily implies a disposition to take effect at the birth of the child. Such a devise was formerly held void; but it was always understood that a devise to an infant, when he should be born, was good as an executory devise. 1 Freem. 244. 1 Wils. R. 206. Snow v. Cutler, 1 Lev. 135.

5. Mr. Fearne says, where a particular estate of freehold is first devised, capable in its own nature of supporting a remainder, followed by a limitation not immediately connected with, or commencing from its expiration; as the latter limitation is incapable of taking effect as a remainder, there seems to be no obstacle to its validity as an executory devise. Therefore, although in the case of a lease for life to A., and after the death of A. and one day after, that the land shall remain to B. for life; it seems that the limitation to B. is void as a remainder, because not to take effect immediately upon the determination of the first estate; yet in the case of a similar limitation by will, there appears to be no ground for denying effect to such ulterior limitation, as an executory devise. Ex. Dev. 21.

6. In consequence of the rule already stated, that no devise shall be considered as executory, which may be supported as a remainder; several cases have arisen where there has been a devise of a particular estate, with a devise over, in which the devise over has been held to be a remainder, supported by the preceding particular estate. Devises of this sort sometimes supported as Remainders.

ante, § 2.

7. Thus, in Pay's case, Lord Talbot said, that if the testator had lived to Michaelmas, then it had been a good remainder.

Purefoy v. Rogers, 2 Saund. 380.

8. A testator devised to his wife for life, and to her son, after the death of his mother, if she should have a son; and if such son should die within age, then to the right heirs of the devisor. The testator died without issue; his wife married again, and had a son. It was adjudged that the estate limited to that son, was not an executory devise, but a contingent remainder; because the mother had an estate of freehold capable of supporting it.

Doe v. Morgan, 3 Term Rep. 763.

9. George Mussell devised lands to Elizabeth his wife for life, remainder to his son Ebenezer Mussell, for ninety-nine years, if he should so long live; and after the several deceases of his wife and son, to the heirs of the body of Ebenezer.

The question was, whether the devise to the heirs of the body of E. should be considered as an executory devise, or as a contingent remainder.

Lord Kenyon said, if ever there existed a rule respecting executory devises, which had uniformly prevailed, without any exception to the contrary, it was that which was laid down by Lord Hale in the case of Purefoy v. Rogers.—That where a contingency is limited to depend on an estate of freehold, which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder. And therefore the Court determined that the devise to the heirs of the body of Ebenezer was a contingent remainder, which was originally supported by the estate for life devised to Elizabeth, and was defeated by her death before that of Ebenezer.

10. Whenever the first devise can be construed to pass an estate tail only, the devise over will be deemed a remainder expectant on the determination of the estate tail, and not an executory devise.

11. John Spalding having issue three sons, John, Thomas, and William, devised lands to John the eldest son, and the heirs of his body, after the death of Alice, the devisor's wife; and if John died living Alice, that William should be his heir. John died in the lifetime of Alice, leaving a son. Spalding v. Spalding, Cro. Car. 185.

It was determined that the construction of the will should be, that if John died without issue, living Alice, William should have the lands; and that it should not be construed, where he limited first to John and the heirs of his body, that by this limitation he intended, if he died living Alice, that William should be his heir, John having issue, and thereby to disinherit the heirs of John's body.

12. A testator having charged certain legacies on his lands, devised that in case his son T. should happen to die before he married, or being married should have no children, then his lands should remain and descend equally to his daughters and their heirs, paying, &c.; and in case both his daughters should die without being married, or being married should have no children, then he willed that all his estate should descend to I. M.; and at the end of the will he gave and devised all his estate, real and personal, not already disposed of by his will, to his son T. Wealthy v. Bosville, Rep. temp. Hardwicke, 258.

After the testator's death, his son T. entered, suffered a recovery, and died without issue; upon which his sisters entered, suffered a recovery, and died also without issue; and then the heir of I. M. entered.

The question was, whether the devise to I. M. was a remainder depending on a particular preceding estate in the son and daughters, or an executory devise.

Lord Hardwicke said, there were two rules which went a great way in determining the case. First, that no limitation should be construed to be an executory devise, if it could be made good by way of remainder. Secondly, that it was immaterial in a will which words were first or last, as the construction must be made upon the whole will; and here, in the subsequent part of the will, there was an express devise of all the residue; so that, taking the two clauses together, there was an express devise to the son; and it was given by the word estate, which was sufficient to carry the fee; so that it amounted to a devise to the son and his heirs, and if he died without issue, remainder over; which was an estate tail. But if that were not so clear, yet as to the daughters no objection could be raised; for there was a devise to them, and if they died without issue, &c.; so that their recovery was sufficient to bar the remainder: and the limitation being clearly good as a remainder, could not be considered as an executory devise.

Must vest within the time prescribed above.

13. The rules established for preventing perpetuities are applied to the second sort of executory devises as well as to the first; and therefore in all cases where a freehold estate is devised, to commence *in futuro*, it must vest within the compass of a life or lives in being, and twenty-one years and a few months after, otherwise it will be void.

14. It should however be observed here, that by the time of vesting is meant the vesting of the freehold; for although land should be limited for a long term of years, with remainder to the unborn son of

a person then living, this executory devise to such unborn son would be good, because the vesting of the freehold is confined to the period of a life in being; for upon the birth of such son, the freehold would vest in him, or upon the death of such person, without leaving a son, either actually born or in *ventre matris*, it would vest in some other person, subject only in either case to the preceding term.

15. W. Gore devised certain lands to trustees and their heirs, to the use of the said trustees for five hundred years, upon several trusts, and from and after the determination of that estate, then to the use of the first and other sons of the testator's eldest son Thomas Gore in tail male, remainder over. Thomas Gore had no child when the testator died, but afterwards had a son. Gore v. Gore, 2 P. Wms. 28.

The Court of K. B. was of opinion that the devise to the eldest son of Thomas Gore was void: that it could not be good as a remainder, for want of a freehold to support it; and that it could not take effect as an executory devise, because it was too remote, viz. after five hundred years. But the case having been sent to the Court of K. B. some years after, Lord Hardwicke, Ch. J., together with Justices Page, Probyn, and Lee, certified their opinion, against that of their predecessors, "that this was a good executory devise, and not too remote; for it must in all events one way or other happen upon the death of Thomas Gore, whether he should have a son or not; and either upon the birth of the son, or upon his death without issue, the freehold must vest."

16. Where an estate is devised to a person upon an event which is too remote, a devise over depending on the same event is also void.

Proctor v. Ep: Bath, 2 H. Black. 358.

17. Mary Proctor devised to the first or other son of her grandson Thomas Proctor that should be bred a clergyman, and be in holy orders, and to his heirs and assigns, all her right of presentation to the rectory of West Coker: but in case her said grandson Thomas Proctor should have no son, then she gave the said presentation to her grandson Thomas Moore, his heirs and assigns for ever. Thomas Proctor died without having ever had a son. The question was, whether these devises were good or not.

It was contended that the first devise was void, as being too remote; for Thomas Proctor had no son born at the time of the death of the testatrix; and if he ever should have a son, he would not necessarily be in orders within twenty-one years after his birth. By the canons of the church no person could be admitted into deacon's orders, before the age of twenty-three, without a faculty; nor could he be ordained priest before twenty-four. And the devise to Thomas Moore was liable to the same objection, on account of the remoteness of the contingency on which it was to take effect; for supposing there had been no previous devise to the son of Thomas Proctor, the devise to Thomas Moore would be to him, if Thomas Proctor had no son in orders; but no time was fixed for his taking orders; and such devise being void in its original creation, could not be made good by the subsequent circumstance of Thomas Proctor's having no son; and the devises could not be considered as alternate. The Court was clearly of opinion that the first devise to the son of Thomas Proctor was void; from the uncertainty as to the time when such son, if he had any, might take orders. And that the devise over to Moore, as it depended on the same event, was also

void; for the words of the will would not admit of the contingency being divided, as was the case in Longhead v. Phelps. And there was no instance in which a limitation after a prior devise, which was void from the contingency being too remote, had been let in to take effect; but the contrary was expressly decided in the House of Lords, in the case of the Earl of Chatham v. Tothill, in which the Judges founded their opinion on Butterfield v. Butterfield. Consequently the heir at law of the testatrix was entitled.

2 Black. R. 704.

6 Bro. Parl. Ca. 451. 1 Ves. 134.

18. In consequence of the rule that an estate devised, to commence *in futuro*, must vest within the period above mentioned, a devise after failure of the issue or heirs of A., where no estate is already vested or given by the express words of the will, or arises by implication to such issue or heirs, is void in its creation. For if A. should have heirs or issue, they might last for ever; and while they did, there would be nobody who could bar the estate thus devised; so that a perpetuity would be created.

A Devise after a general Failure of Heirs or Issue is too remote.

19. T. C. being tenant for life, with remainder to his wife for life, remainder to his own right heirs, made his will, inwhich were these words:—"*Item*, my land at W. my wife Mary is to enjoy for her life; after her death, it of right goes to my daughter Elizabeth for ever, provided she has heirs. But if my said daughter dies before her mother, or without heirs, and my said wife Mary should marry again, and should have heirs male, I beqneath all my said right in W. to her heirs male by her second husband."

Wright v. Hammond, 8 Vin. Ab. 110. 1 Stra. 427.

Mary the wife died before Elizabeth the daughter, but Mary had married a second husband, and had

issue male; and the question was, whether the devise to them was good.

It was resolved that no estate was devised to the daughter; what was said in the will respecting her, being only a declaration how she was to enjoy the estate; for the testator could not say, "It of right goes to my daughter," if she claimed under the will. It was therefore a devise after a general failure of heirs of the daughter, which was too remote.

Lanesborough v. Fox, 3 Bro. Parl. Ca. 130.

20. Sir George Lane, upon the marriage of his son James Lane, settled certain lands to the use of himself for life, remainder to his son James Lane for 99 years, if he should so long live, remainder to trustees and their heirs during the life of James, to support contingent remainders; remainder to the first and other sons of the said James by his then intended wife, successively in tail male; remainder to the heirs male of the body of James; remainder to the right heirs of Sir George. The marriage was had, and afterwards Sir George made his will, and devised the lands comprised in the settlement, on failure of issue of the body of James Lane, and for want of heirs male of his own body, to his daughter Frances Lane, and the heirs of her body. And in a subsequent part of his will he devised, that if his son James should die without issue male, and his (the testator's) wife survived him, his wife should have his house and park at R. during her life.

After the death of Sir G. Lane (who became Lord Lanesborough) leaving the said James his only son and heir, and two daughters by his first wife, and the said Frances Lane by his second wife; the trustees joined with James Lane in making a tenant to the *præcipe*; and a common recovery was suffered of the estates comprised in the settlement.

James Lane Lord Lanesborough died without issue, and Frances Lane married Henry Fox, and died leaving issue George Fox her eldest son, who brought an ejectment for the recovery of the estate. A special verdict was found, and judgment was given in the courts of Exchequer and Exchequer Chamber in Ireland, for the plaintiff Fox.

An appeal was brought to the House of Lords of England, and two questions were put to the Judges; 1st. Whether Lord James took any other or greater estate by the will, than by the settlement. To which they answered, that Lord James could not take any estate tail, no alteration being made by the will; and that no estate was raised to Lord James by implication. 2. Whether Frances Lane took any estate under the will of Lord George. To which they answered, that she took no estate whatever, but that the devise to her was absolutely void in its creation, as being on too remote a contingency. Whereupon the judgment was reversed.

Cases temp. Talbot, 267.

Vide infra, § 24.

21. Mrs. Mostyn, on the marriage of her niece Mrs. Wynn, who afterwards became her heir at law, with Doctor Wynn, entered into articles, covenanting to settle an estate for life on Mrs. Wynn, with remainder to the issue of that marriage in tail, with the reversion to herself in fee, whenever Doctor Wynn should have settled his own estate to the same uses. Mrs. Mostyn by her will, reciting the articles, gave her equitable reversion in the premises to the heirs of the body of Mrs. Mostyn by any after-taken husband, and for want of such issue, remainder over to Charles Lloyd in tail. Mrs. Wynn died without issue, living her husband.

Goodman v. Goodright, 1 Black. R. 188. Doug. 507. *n.* Vide Fearne's Cont. R. 6th edit. 456.

It was determined that this was a future executory devise of the reversion to the heirs of the body of

Mrs. Mostyn, by her second husband, during the first marriage, on failure of heirs of her body by her first husband; which was too remote, and therefore void.

Habergham v. Vincent, 5 Term R. 92.

Exceptions: 1st. A Devise of a Reversion.

22. There are, however, some cases in which a devise, after a general failure of heirs or issue, is good. First, where a person entitled to a reversion, expectant on the determination of an estate tail, devises the lands to another, after failure of issue of the tenant in tail; this is held to be an immediate devise of the reversion, and therefore good. For the estate devised commences upon the death of the testator; and the words which have a future prospect are used to denote, not the commencement of the estate devised, but the event on which the estate shall take effect in possession; and there can be no danger of a perpetuity, because the reversion thus devised may be barred at any time by a recovery, suffered by the person having the preceding estate tail.

Badger v. Lloyd, 1 Ld. Ray. 523. 1 Salk. 232.

23. Thus where a person conveyed his estate to the use of himself for 99 years, if he should so long live, remainder to his wife in the same manner; remainder to his son in the same manner; remainder to trustees and their heirs, during the lives of the father and son, to preserve contingent remainders; remainder to the first and other sons of the son in tail male; remainder to the father in fee. The father made his will, and after reciting the settlement, devised the lands, after the death of his son without issue male, to another son.

It was objected that the devise was executory; and as it could only take effect on the death of the son without issue, it was void, as being too remote. But to this it was answered, that here a man entitled to a reversion, expectant on an estate tail, devised it,

after the death of the tenant in tail without issue, to another: this was not an executory, but an immediate devise; and the words, "from and after," were only a declaration when it should take effect in possession. If the son had not an estate tail in the land, but the devises had been after the death of a stranger without issue, they would have been executory devises, and void by reason of the remoteness of the possibility; but here they were limited after the determination of the particular estate.

24. In the case of Lanesborough v. Fox Mr. Fearne observes, that the limitation to the daughter was future, to arise after failure of issue of the body of James Lane, and the heirs male of the body of the testator. Now there was no subsisting estate extending to the issue of the body of James Lane generally, the settlement being confined to his first and other sons in tail male, and the heirs male of his body: nor indeed was there any estate tail in the testator himself to extend to the heirs male of his own body: therefore the estate devised by the testator to his daughter could not be considered as a reversion expectant on such preceding estates. And though it should be granted that as the testator had but one son, and there was a limitation by the settlement to the first and other sons of such son in tail male, the devise, for want of heirs male of the testator's own body, might have been construed as a devise of the reversion, expectant on failure of the sons of his son, and the heirs male of their bodies; yet, as there was no pre-existing estate extending to issue female of the body of James Lane, it was impossible to consider the devise on failure of issue generally of the body of James Lane, as the devise of a reversion expectant on failure of such issue;

ante, § 20. Fearne Ex. Dev. 326.

there being no preceding estate extending to that period; consequently, unless such a preceding estate was raised by implication, which was not admitted, the devise to the daughter was not the devise of a reversion, but was an executory limitation, unsupported by any preceding estate; and being not to take effect till after a general failure of issue, was therefore too remote.

Jones v. Morgan, 3 Bro. Parl. Ca. 322. Fearne's Cont. Rem. 6th edit. App. No. 3.

25. Sir William Morgan, upon his marriage with Lady Rachel Cavendish, settled certain estates in the counties of Monmouth and Glamorgan, upon himself for life, remainder to trustees to support contingent remainders; remainder, subject to a jointure rent-charge to his wife, to his first and other sons by Lady R. C. successively in tail male; reversion to himself in fee. Afterwards Sir W. Morgan, having two sons by that marriage, William and Edward, made his will; and after giving certain specific things to his wife and his sons, and making a disposition of other lands in the said counties, which he had purchased after his marriage, he proceeded in these words:—"And forasmuch as it is my will, intent, and meaning, that in case my said two sons now living, or any other son or sons of mine lawfully begotten, hereafter to be born, should die without issue male of their bodies, or of the body of some or one of them, lawfully to be begotten; after their respective decease, without issue male as aforesaid, that then all and singular my messuages, &c. within the several counties of Monmouth and Glamorgan, and not herein-before devised, shall be devised and settled to and for the several uses, intents, and purposes herein-after mentioned, limited, expressed, and declared: it is therefore my will, intent, and meaning, that in case my said sons Wil-

liam and Edward, or any other son or sons of mine hereafter to be born as aforesaid, shall happen to die respectively without any issue male of their bodies, or of the body of some or one of them as aforesaid; and in such case, if it shall so happen, then I give and devise the remainder of all and singular my messuages, &c. within the several counties of Monmouth and Glamorgan, and not herein and hereby before devised, and the reversion and reversions, remainder and remainders of the same premises, to my said brother Thomas Morgan, for and during the term of his natural life, but subject nevertheless to the several provisoes and payments mentioned and contained in my said marriage settlement." The testator then limits the same lands to trustees, during the life of Thomas Morgan, to preserve contingent remainders; remainder to Thomas Morgan the son of the said Thomas Morgan, during his life; remainder to his first and other sons in tail male, with divers remainders over.

The testator died leaving his said wife, and his said two sons, and also two daughters by her. And one of the questions upon this will was, Whether the residuary devise over to Thomas Morgan and his son was not void, as being a future limitation, not to take effect till after the failure of issue of persons who took no preceding estate; namely, of all the other sons of Sir William Morgan by any future wife. For the limitation to Thomas Morgan was not expressed to take effect upon failure of issue male of the testator's sons by his then wife, in which case it would have been good as an immediate devise of the reversion, expectant on the estates in tail male limited to such sons by the settlement; but the words were general and comprehensive, extend-

ing in point of expression as well to the future sons of the testator by any after-taken wife, as by his then wife; and if so, this limitation could not be a devise of the reversion immediately expectant on the estates subsisting, or created by the settlement, but was a future devise, without any preceding estate to support it; and then, as it could not take effect as a remainder, it could be considered only as an executory devise; in which light it must be void, for it was too remote, as being limited to vest on a general failure of issue.

In support of the devise it was contended, that the testator had not a future marriage in view, or any children not provided for by the settlement. That this appeared from his giving some specific legacies to his wife, naming her one of his executors, and one of the guardians of his children. Therefore the words, "or any other son or sons," &c. should be understood as confined to sons by his then wife; and under that construction the limitation in question would be as good as an immediate devise of the reversion, subject to the estates created by the settlement; or that if those words did extend to children by a future marriage, still the limitation in question might be supported, by raising implied estates tail to such children.

Upon a case stated for the opinion of the Court of K. B., the Judges of that court certified—"They were of opinion that the event of a second marriage was not in the testator's contemplation: but supposing that, from the generality of the description, the words "any after-born son" should be extended to the son of any future marriage; they were of opinion that from the manifest intent of the testator, expressly declared in his will, such son must take

an estate tail. Consequently they were of opinion that, either way, a remainder after estates tail was devised to Thomas Morgan, who by virtue of the said limitation, upon failure of the sons of the testator without issue male, was entitled to all the lands in the counties of Monmouth and Glamorgan, devised by the residuary clause in the said will, for life; with remainder according to the limitations in the said will."

Lord Bathurst decreed accordingly. He concurred entirely with the opinion certified by the Judges, in regard to the event of a future marriage not being in the testator's contemplation; and consequently that the words, "or any other son or sons," were to be restrained to sons of the first marriage. But as to the raising an estate tail to any sons of a future marriage, he expressed himself inclined to the opinion, that he was bound by the decision of the House of Lords in the case of Lanesborough v. Fox, as a direct authority against the admitting such implication.

Upon an appeal to the House of Lords this decree was affirmed, agreeable to the unanimous opinion of the Judges, founded, as appeared by what was expressed by the Ch. J. of the Court of Common Pleas in delivering their opinion, upon the very same ground to which Lord Bathurst seemed to think himself confined, namely, the presumption that the event of a future marriage was not in the testator's contemplation; and that therefore the words, "or if any other son or sons," &c. must be understood of sons of the testator by his then wife. Fearne, Ex. Dev. 131.

26. Secondly, a devise in default of issue of the devisor's own body, has been construed to be a conditional devise, to take effect at the death of the 2d. A Devise in default of Issue of the Devisor.

testator; and has therefore been held not to be executory; because it must be determined at the instant when the will takes effect, that is, at the death of the devisor.

French v. Caddell, 3 Bro. Parl. Ca. 257.

27. James Farrel by his will devised, upon default of issue male and female of his own body, all his estate in the counties of Galway, &c. to Peter and Denis Daly and their heirs, in trust to pay all his just debts; and after payment thereof, and securing the provision made to his wife, he limited his estate in the county of Galway to the use of John Kelly jun. for life, remainder to trustees to support contingent remainders, remainder to his first and other sons in tail male, with several remainders over.

The Court of Chancery of Ireland decreed that this devise was good.

On an appeal to the House of Lords of England it was contended, that this devise being to take place on failure of the issue male and female of James Farrel, whensoever the same should happen, without anything contained in the will to restrain the contingency to his own death, or any other particular time, it was void.

On the other side it was argued, that the devise under the will of James Farrel was at his death a devise in possession, and not an executory devise. No estate was limited to the issue by the will, but it was plain he meant a failure of issue living at the time of his death. The first trust was to pay debts, legacies, and annuities to his sisters for their lives; and he could not have intended that those trusts should take place a hundred or two hundred years after his death. The legacy given by a codicil to J. C., of which the first payment was to be made on the first of November next after his decease, showed

what he meant by dying without issue; namely, if he should have no issue when his will should take effect; and the codicil was expressed to be in addition to the will, and directed that the will should stand in all points not thereby altered, and therefore the legacies were by the will and codicil payable only on the event of his dying without leaving issue at his death; and by this construction none of the dangers could arise which prevent the effect of executory devises, nor was any rule of law broken. The decree was affirmed.

28. On a case sent out of Chancery for the opinion of the Court of K. B. the facts were—Richard Cary, after directing all his debts to be paid, devised thus: *Item*, in default of issue of my own body, I give to trustees and their heirs, &c. in trust to pay his sister an annuity of 100*l.* till his debts and legacies were paid, and after payment thereof, to his sister for life, with divers remainders over, in strict settlement. Willington v. Willington, 1 Black R. 645.

It was objected, that this devise to the trustees being after an indefinite failure of issue, was executory and too remote; to which it was answered, that it was not executory, but depended on a precedent condition, upon which the testator intended the whole should take effect. That the words "in default of issue" were different from the words, on failure of issue: the one implied that the devisor never should have issue; the other, that he should have issue, which should afterwards fail. The first contingency must be determined at his own death; the latter might be suspended for ages.

The Court certified that the devise was good; that the trustees took a base fee, determinable on the payment of the testator's debts and legacies out of

the profits of the estate. And Sir William Blackstone says, that this certificate was principally founded on the idea of the will's being merely conditional, in case the devisor left no issue of his body.

Lytton v. Lytton, 4 Bro. R. 441.

29. J. R. Lytton, being an infant, entered into articles on his marriage, by which he agreed to settle his estate, after his own decease, to the intent that his intended wife should receive a certain jointure, and subject thereto to the first and other sons of the marriage in tail, remainder to himself in fee. J. R. Lytton suffered a recovery when he came of age, but never made a settlement in pursuance of the articles. Fifteen years after, being in a weak state of health, and his wife living, he made his will; and having given his wife a rent-charge in satisfaction of the articles; he gave and devised his estate, on failure of issue male of his body, to trustees, to raise money for the payment of his debts, and subject thereto to his nephew in strict settlement.

Lord Northington declared that the devise to the nephew, after a general failure of issue male, was void, the contingency being too remote.

Upon a bill of review, Lord Loughborough said, this case did not appear to have been determined after that deliberation which would give it the sanction due to a decree of Lord Northington. The case of Lanesborough v. Fox was considered as governing this case; but when fairly examined, there could not be a greater dissimilitude. Here the testator had had no child for several years, his only child was just dead, the devisee was his next and immediate heir; but he introduced the devise by the words, "in failure of issue male." Could this mean more than to take in the event which alone prevented the estate from being the subject of an immediate devise? He

certainly had the articles in contemplation; there was no prospect of issue at the time. It was not like Lord Lanesborough's case, who had issue, and might have many more; it would be a harsh construction that the testator had here the idea of a future issue in contemplation, and an indefinite failure of that issue. He meant to give an immediate estate in possession at his decease; every clause in the will shewed his intention. It was manifest he had no intention of giving an estate after a general failure of issue. The circumstances of the testator and his family had always been taken into consideration in these cases.

Decreed, that the declaration made by Lord Northington should be reversed.

3d. A Devise over for Life on Failure of Issue of the first Devisee. Fearne, Ex. Dev. 279. Oakes v. Chalfont, infra, c. 19.

30. An executory devise over for life, to a person *in esse*, to take place after a dying without issue of the first devisee, may be good; because the future limitation being only for the life of a person *in esse*, it must necessarily take place during that life, or not at all; and therefore the failure of issue in that case is confined to the compass of a life in being.

4th. Where an Estate Tail is raised by Implication.

31. There are also several cases in which the courts have supported a devise over after a general failure of heirs or issue, by raising an estate tail by implication in the person, on the failure of whose heirs or issue the estate is devised over; for in that case the second devise is supported as a remainder, expectant on the determination of such prior estate tail.

Walter v. Drew, ante, c. 12. § 33.

32. Thus, in a case which has been already stated, the Court having held that the first devisee took an estate tail by implication, it followed that the devise over was good as a remainder.

Jones v. Morgan, ante, § 25.

33. In another case, which has been stated in this chapter, the Judges of the Court of K. B. appear, from their certificate, to have been of opinion, that if a second marriage was in the contemplation of the testator, then an estate tail was raised by implication to the sons of that marriage, and therefore that the devise over was good, as a remainder expectant on the determination of that estate tail.

TITLE XXXVIII.

DEVISE.

CHAP. XIX.

Executory Devises of Terms for Years.

1. *A Bequest over of a Term for Years is now good.*
5. *And also a similar Declaration of Trust of a Term.*
6. *Though to a Person not in esse, or not ascertained.*
9. *The first Devisee cannot bar the Devise over.*
13. *Within what Time such executory Bequest must vest.*
14. *Cannot be limited after a general Failure of Heirs or Issue.*
17. *Such Limitation not supported as a Remainder.*
18. *Where the Failure of Issue is confined to the Time prescribed, it is good.*
26. *The Words "dying without Issue," is sometimes restrained to the Death of a Person in esse.*
33. *No Distinction between Words giving an express Estate Tail, or by Implication.*
35. *Nor between a Devise for Life and an indefinite Devise.*
38. *An executory Devise for Life, after a general Failure of Issue, is good.*

Section 1.

A Bequest over of a Term for Years is now good.

UPON the first introduction of long terms for years, it was held that if a term for years was given to a person for life, with a remainder over, the bequest of the remainder was void; because an estate for life being of greater estimation in the eye of the law than the longest term for years, it was concluded that the limitation of a term for years to a person for life was a complete disposition of it, and therefore nothing remained to be given over. Another reason for this doctrine was, that the possibility of a

term's continuing longer than the life of the person to whom it was first bequeathed, was not such an interest as by the rules of law could be limited over.

2. A distinction was formerly made between a bequest of the use of a personal thing, and of the thing itself; and in the former case the devise over was good. When long and beneficial terms for years came into general use, the convenience of families required that they might be settled in the same manner as freehold estates; it was therefore fully settled in the reign of Queen Elizabeth, that a bequest of the residue of a term for years, after a previous disposition of it for life, was good; and this doctrine was confirmed by the two following determinations.

Welcden v. Elkington, Plowd. 519.

Manning's Case, 8 Rep. 95.

3. Edward Manning being possessed of the moiety of a mill for the term of fifty years, made his will in writing, and thereby devised his indenture and lease of the said mill, and all the years therein to come, to Mathew Manning, after the death of Mary Manning his wife; which mill, his will was, that Mary his wife should enjoy during her life, conditionally that the said Mathew Manning should not devise, sell, or give the said lease, but leave it wholly to John his son.

It was resolved by Lord Coke and the other Judges that the devise to Mathew Manning was good: that he took it not by way of remainder, but by way of executory devise; and that there was no difference when one devised his term for life, the remainder over, and when a man devised the land, or his lease or farm, or the use, or occupation, or profits of his land; for in a will, the intent and meaning of the devisor was to be observed, and the law would make construction of the words to satisfy his intent, and to put them into such order and course that his will

should take effect; and always the intention of the devisor expressed in his will was the best expositor, director, and disposer of his words; and when a man devised his lease to one for life, it was as much as to say, he should have so many of the years as he should live, and that if he died within the term, another should have it for the residue of the years; and although at the beginning it was uncertain how many years he should live, yet when he died, it was certain how many years he had lived, and for how many years the other should have it; and so by a subsequent act all was made certain.

4. J. Morris being possessed of a house for the term of 500 years, devised it to his father for the term of his natural life, and after his decease the remainder of the said house to Elizabeth the sister of the testator, and to the heirs of the body of the said Elizabeth. Lampet's Case, 10 Rep. 46.

Upon the question whether this executory devise, after the death of the testator's father, was good, when the term itself, and not the use or occupation of it for life, was devised to the first devisee for life, it was resolved, that in such case also the executory devise over was good, and that the assent of the executor to the first devisee should enure to the other.

5. The same necessity which induced the Judges to allow of executory bequests of terms for years, required that similar limitations should be allowed in deeds by which the trusts of terms for years were declared. Thus, Lord Mansfield has said, "When long and beneficial terms came in use, the convenience of families required that they might be settled upon a child after the death of a parent; such limitations were soon allowed to be created by will, and the old objections were removed by And also a similar Declaration o Trust of a Term. 1 Burr. 284.

changing the name from remainders to executory devises. The same reason required that such limitations might be created by deed, as, for instance, marriage settlements, to answer the agreement of parties and exigencies of families."

1 Vern. 235.

For these reasons it was settled in the reign of King Charles II. that the limitations of the trust of a term should be governed and guided by the same rules in equity, as the devise of a term was at law; and that such limitations as would be good in one case, would be so in the other, and *e converso*.

Though to a Person not in esse or not ascertained.

6. Although the person to whom a term for years is bequeathed over, after a previous disposition of it to another for life, be not in *esse*, or not ascertained, still the bequest over will be good.

Cotton v. Heath, 1 Roll. Ab. 612. 1 Ab. Eq. 191.

7. A termor for years devised the term to his wife for eighteen years, and after to his eldest son for life, and after to the eldest issue male of that son for life.

It was held, that although the eldest son had not any issue male at the time of the devise and death of the testator, yet that if he had issue male at his death, such issue male should have it, as an executory devise; for that, notwithstanding its being a contingency upon a contingency, and the issue not being in *esse* at the time of the devise, yet inasmuch as it was limited to the son but for life, it was good, and all one with Manning's case.

ante, c. 11. § 80.

8. Although a bequest of a term for years to a person and the heirs of his body vests the entire and absolute property of the term in him, if not restrained by subsequent words, yet if a bequest over of it is made, which is within the rules established for preventing perpetuities, it will be supported as an executory devise.

Duke of Norfolk's Case, infra.

9. It was resolved in Manning's case, and also in Lampet's case, that in bequests of this sort, after the executor has assented to the first bequest, it is not in the power of the first taker to bar the bequest over, or executory devise; for he cannot transfer more to another than he has himself. The first Devisee cannot bar the Devise over.

10. Mr. Fearne says, it seems to follow, as a consequence of this exemption of executory interests from the power of the first devisee or legatee, that where there is an interest devised to one for life, &c. out of a term, and then an executory devise over of the residue of the term to another, any subsequent union of the freehold or inheritance with the interest so given to the first devisee, or a feoffment or other act of forfeiture by such first devisee, will not extinguish or affect the interest of the ulterior devisee: for if it could, the executory interest might easily be annihilated, without any prejudice to the temporary interest of the first devisee, by collusion betwixt him and the reversioner. Ex. Dev. 55.

11. A person possessed of a house for a term of years, devised the profits thereof to I. during the time she should continue sole, and then devised the term to R. and died. I. entered by assent of the executor; and afterwards purchased the fee. Hamington v. Rudyard, cited 10 Rep. 52 *a*.

It was resolved, that although the whole term was in I. *quousque*, &c., so that by the purchase of the fee simple *her* interest became extinct, yet the same did not defeat the executory devise to R., but that after the marriage of I., and not before, he might enter.*

* A distinction was formerly admitted between a devise of a *term* and a devise of the land, which is now exploded.

ante, § 7.

12. In the case of Cotton v. Heath, the eldest son, to whom the term was devised for life, made a feoffment of the lands; whereupon the reversioner in fee entered for the forfeiture; and it was decreed that the feoffment and entry for the forfeiture did not destroy the executory bequest.

Within what Time such executory Bequest must vest.

13. When it was settled that an executory bequest of a term for years could not be barred, it became necessary to apply the same rule to this kind of limitation, as to executory devises of estates of inheritance; namely, that it should vest within the compass of a life or lives in being, and twenty-one years and some months after.

Long v. Blackall, infra.

Cannot be limited after a general Failure of Heirs or Issue.

14. In consequence of this principle it has been long settled, that where a term for years is limited over after a general and indefinite failure of heirs or issue, it is void, as being too remote.

Burford v. Lee, 2 Freem. 210.

15. A lessee for 1,000 years devised his term to L.; and if he died without issue, then to B. The Court held that the devise over was void, and that the whole estate vested in L. his executors and administrators.

Love v. Windham, 1 Mod. 50. 1 Lev. 290.

16. A person devised a term for years to his wife for life, and after her decease, to Nicholas his son for his life; and if Nicholas his son should die without issue of his body begotten, then he devised it over to Barnaby.

The whole Court was unanimously of opinion that the bequest to Barnaby was void; for that as he could not take until the death of Nicholas without issue, it was the same in effect as if it had been to Nicholas and the heirs of his body, with remainder to Barnaby; which would have been clearly bad; because after a term was devised to one and the heirs of his body, no other limitation, nor any ap-

pointment of it by way of executory devise, could be made; for the law would not presume any term to have continuance so long as issue of the body might continue; and therefore a limitation after an indefinite failure of issue, depended upon too remote a possibility.

17. In cases of this kind, the bequest over cannot be supported as a remainder, by raising an estate tail in the first taker, because a term for years cannot be entailed; nor can a remainder over be limited of a term after a disposition of it to a person and the heirs of his body, because such a disposition gives the entire and absolute property of the term, so that nothing remains to be given over.

Such Limitation not supported as a Remainder.

18. It was formerly held, that though the failure of issue was confined to the period of a life in being, yet the bequest over was void.

Where the Failure of Issue is confined to the Time prescribed, it is good. Child v. Bayley, Cro. Ja. 459. infra.

19. A person possessed of a term for years devised it to D. his wife for life, and after to William his eldest son, and his assigns; and if he died without issue then living, to Thomas another son. This was held a void devise to Thomas.

20. The doctrine laid down in the above case was departed from in the reign of Charles II.; and it was held, that where a term for years was limited over, upon a failure of heirs or issue, if there were words to restrain the failure of such heirs or issue within the compass of a life or lives in being, and twenty-one years and some months after, the limitation would be good; as being within the rule established by the courts for preventing perpetuities.

21. Henry Frederick Earl of Arundel, by indentures of lease and release, dated in 1647, settled the barony of Graystock, and other estates, on himself

Duke of Norfolk's Case, 3 Cha. Ca. 1. 2 Cha. R. 119. Pollexf. 223.

for life, remainder to his lady for life, remainder to trustees for a term of 200 years, remainder to his second son Henry Howard in tail male, remainder to his third son Charles Howard in tail male, remainder to all his other sons successively in tail male, remainder over. And by another deed of the same date, the Earl of Arundel declared the trust of the term of 200 years to be, that the said term should attend the inheritance; and the profits of the said barony, &c. should be received for the said term of 200 years by Henry Howard and the heirs male of his body, so long as Thomas Lord Maltravers, the eldest son of the said Earl of Arundel, or any issue male of his body, should be living; but in case Lord Maltravers should die without issue male, *in the life of Henry Howard*, not leaving his wife *ensient* with a son, or in case, after the death of Lord Maltravers without issue male, the honour of the earldom of Arundel should descend to Henry Howard, then he and his issues to have no benefit of this term of 200 years, but it was to descend to the other brother, Charles Howard, the plaintiff.

The Earl of Arundel died in 1652; his lady died in 1673; and in 1675 Lord Dorchester, who was the surviving trustee of the term, assigned it to one Marriot, who assigned it to Henry Howard, who suffered a recovery of the estate to the use of himself in fee.

In the year 1677, Thomas Lord Maltravers, the elder brother of Henry, who became Duke of Norfolk by the death of his father, died without issue, whereby the dukedom descended to Henry; and the plaintiff Charles Howard's bill was, to have execution of the trust of the term, to him and the heirs male of his body.

The cause was argued before Lord Chancellor Nottingham, assisted by the Chief Justices North and Pemberton, and Lord Ch. Baron Montague.

The two Chief Justices and the Chief Baron agreed that the limitations of trusts of terms for years, and executory devises of them, ought to be governed by the same rules. That no limitation over of a term for years, after an estate to a person and the heirs of his body, had ever been permitted: that as no direct remainder could be limited over in such a case, so neither could a contingent remainder be limited over, though the event on which it was limited should happen ever so soon. That the case of Child v. Bayley was a positive authority against the validity of a limitation of this kind, the admission of which would be productive of perpetuities. They were therefore unanimously of opinion that the limitation over to Charles Howard was void.

Lord Nottingham said, the great objection which had been made to the validity of this limitation was, that it tended to a perpetuity. A perpetuity was the settlement of an estate or interest in tail, with such remainders expectant on it as were not in the power of the tenant in tail to dock, by any means whatsoever, but must continue as perpetual clogs on the estate. But future interests, springing trusts, or trusts executory, and remainders which were to arise upon contingencies, were quite out of the rules and reason of perpetuities, if they were limited on events which must soon happen.

No principle of law had been laid down oftener than this, that there could be no remainder of a freehold estate limited after a fee simple; yet the nature of things, and the commerce between man and man, had induced the Judges to relax this rule, and allow

of executory fees in devises, and conveyances to uses. But it was said that a lease for years, which was but a chattel, would not bear a contingent limitation, on account of its meanness. As to this point, the difference between a chattel and an inheritance was a difference only in words, and not in reason; for the owner of a lease had as absolute a power over it, as a person who was seised in fee had over the inheritance. If a springing trust of a term was not allowed, as well as a springing use of an inheritance, men possessed of terms for years would not be capable of making that provision for their families which the laws of every country ought to support.

Suppose a man possessed of no other property than a long term for years, should, on the marriage of his son, assign the term to trustees, in trust for himself and his executors, till the marriage took effect; and from the solemnization of the marriage to the son for life, remainder to his wife for life, &c.; this would not be a void limitation in a marriage settlement. And if this springing trust, to arise on the contingency of a marriage was good, why should not the springing trust in the present case be equally good. If the estate had been limited to Henry Howard and the heirs male of his body, until the death of Thomas Lord Maltravers without issue generally, and then to Charles, the limitation would certainly have been void; but the addition of the words —" If Thomas Lord Maltravers die without issue in the lifetime of Henry," entirely altered the case; as the event on which the term was limited over was thereby circumscribed to the period of a life then in being; and as a chattel interest would bear a remainder over, where there was no danger of a perpetuity, it must of course bear a remainder over upon a contingency which

must inevitably happen during the existence of a life in being.

The principal authority against the plaintiff was the case of Child v. Bayley. That case was variously reported; the true state was thus:—A term of 76 years was devised by a person to his wife for life, then to his son William and his assigns for all the rest of the term; provided that if William died without issue then living, the term should go over to Thomas; which he agreed was the same as the then present case. The remainder to Thomas was held to be void in its creation; but the resolution in that case went upon several reasons which were not to be found in this case; and besides, that case had been contradicted since.

Child v. Bayley, Cro. Ja. 459.

In a subsequent case the trust of a long term was limited to the father for 60 years, if he should so long live, then to the mother in the same manner, then to John the son, and his executors, if he survived his father and mother; and if he died in their lifetime, having issue, then to his issue; but if he died in the lifetime of his father and mother without issue, then remainder over to his brother. John died without issue, in the lifetime of his father and mother; and the question was, whether the limitation over to the brother was good.

Wood v. Saunders, Pollexf. 35.

It was resolved by Lord Keeper Bridgeman, assisted by Twisden and Rainsford, Justices, that the limitation over to the brother was good; as the contingency on which it was to take place must happen during the existence of two lives then in being. Thus it appeared that Sir Orlando Bridgeman, who drew the deeds in this case, continued of the same opinion that he was of when a conveyancer.

It was decreed that the limitation over to Charles Howard was good.

Upon a bill of review, this decree was reversed by Lord Keeper North; but an appeal being brought in the House of Lords, the decree of reversal was reversed, and Lord Nottingham's decree finally established.

19 June 1685. Journ. v. 14. p. 49.

Lamb v. Archer, Comb. 208.

22. Upon a special verdict the case was thus: A. devised a long term for years to his son B. and the heirs male of his body, and if he died without issue, living his mother, then that it should go over to his son C. The contingency happened: and it was resolved that the devise over to C. was good, upon the reason and authority of the Duke of Norfolk's case.

Carth. 266.

In another report of this case it is said the Court, without any difficulty, held it a good limitation, by way of executory devise, to C.; and that it did not tend to a perpetuity, as was suggested; and denied the case of Child v. Bayley, but said that the established law in cases of this nature was according to the resolution in the Duke of Norfolk's case.

Fletcher's Case, 1 Ab. Eq. 193.

23. A person devised a term for years to his wife for life, and after her death to B. F. for her life, and after her death to T. F. and his children, and then devised in these words:—"And if it shall happen that the said T. F. do die before the expiration of the said term, not having issue of his body then living," then to go over to the plaintiffs, for the residue of the term.

This bequest was held good, the failure of issue being confined to the life of T. F.

Long v. Blackall, 7 Term R. 100.

24. In a case sent from the Court of Chancery for the opinion of the Court of K. B., it was stated; that

George Blackall being possessed of a term for years, devised it, after the death of his wife, to the child with which the testator's wife was then *ensient*; in case it should be a son, during his life; and after his decease, then to such issue male, or the descendants of such issue male of such child, as at the time of his death should be his heir at law: and in case that at the time of the death of such child there should be no such issue male, nor any descendants of such issue male, then living; or in case such child should not be a son; then he bequeathed the same to Philippa Long, her executors, &c.

The wife of the testator was *ensient* at the time of making the will, and when the testator died; and had a son, who died without issue.

The question directed by the Chancellor was, whether the limitation to Philippa Long was good.

Lord Kenyon said, the rules respecting executory devises had conformed to the rules laid down in the construction of legal limitations; and the Courts had said, that the estate should not be unalienable by executory devises, for a longer time than was allowed by the limitations of a common law conveyance. In marriage settlements the estate might be limited to the first and other sons of the marriage in tail; and until the person to whom the first remainder was limited was of age, the estate was unalienable. In conformity to that rule, courts of law have said,—So far we will allow executory devises to be good. To support this decision he could refer to many others; but it was sufficient to mention the Duke of Norfolk's case, in which all the learning on this head was gone into; and from that time every Judge had acquiesced in that decision. It was an established rule that an executory devise was good, if it must necessarily

happen within a life or lives in being, and 21 years and the fraction of another year, allowing for the time of gestation.

Mr. J. Lawrence said, the devise over in this case must take effect, if at all, after a life which must be in being within nine months after the devisor's death.

The Judges certified that the limitation to Philippa Long was good.

25. It is observable that this case began with a devise to a posthumous child for life, with a limitation over, upon failure of issue of his body at his death, which of course would include an heir male then *in ventre sa mere:* for as the devise began with an allowance for the birth of a posthumous child, and also might conclude with it, the time might be claimed twice over; and so the time allowed for the birth of a posthumous child, after lives in being, and 21 years, might be enlarged to two periods of gestation. But this determination has been confirmed after great deliberation in a subsequent case, which will be stated hereafter.

Thelusson v. Thelusson, infra, c. 20.

The Words, "dying without Issue", sometimes restrained to the Death of a Person in esse.

26. In the case of executory bequests of terms for years, the Court of Chancery has very much inclined to lay hold of any words in a will to restrain the generality of the words, *dying without issue,* and confine them to dying without issue living at the time of the person's decease, in order to support the intention of the testator; for by this construction the devise over becomes valid, being confined to the period of a life in being.

Target v. Gaunt, 1 P. Wms. 432.

27. One possessed of a term for years, bequeathed it by his will to his son Henry for life, and no longer; and after his decease, to such of the issue of the said Henry, as Henry by his will should appoint; and in

case Henry should die without issue, the testator devised the same to his brother Albinus for the residue of the term, and died.

Henry died without issue living at his death; whereupon the question was, whether the term should go to the executors of the first testator, or to the executors of Henry, or to Albinus.

It was objected, that the devise over of a term, upon a dying without issue, was void; being too remote an expectancy, and tending to a perpetuity.

Lord Chancellor Parker held, that the expression, dying without issue, had two senses; first, a vulgar sense, and that was, dying without leaving issue at the time of his death; secondly, a legal sense, and that was, whenever there was a failure of issue. And if this will was taken in a vulgar sense; viz. if Henry died without leaving issue at the time of his death, then the devise over to Albinus was good. Now this seemed to be the meaning of the testator in this case; for it must be intended, *such issue* as he should, or at least might, appoint the term to; which must be intended issue then living: and this construction should be the more favoured, in regard it supported the will; whereas the other destroyed it.

Therefore the Court held that the devise over of the term to Albinus was good; and observed that there was a great diversity betwixt a devise of a freehold estate to A. for life, and if A. dies without issue then to B., and a devise of a term in the same words. For in the former case this might give A. an estate tail; because the words, if A. die without issue, in case of an inheritance, are inserted in favour of the issue, and to let in the issue after the death of the father. But in the case of a term, these words could not have such effect, for the father takes the

ante, c. 12. § 43.

whole, which on his death will not go to his issue, but will belong to his executors.

Forth v. Chapman, 1 P. Wms. 663.

28. A term for years was devised to William and Walter Gore; and if either of his nephews William or Walter should depart this life, and leave no issue of their respective bodies, then he gave the said leasehold premises to the daughter of his brother.

Sir Joseph Jekyll was of opinion that the devise over was void; and said, that had the words been, if A. or B. should die without issue, remainder over, this plainly would have been void, and exactly the case of Love v. Windham.

ante, § 16.

On an appeal to Lord Chancellor Parker the decree was reversed; and his lordship said, if a term was devised to A., and if A. die without leaving issue, remainder over;—in the vulgar and natural sense this must be intended if A. died without leaving issue at his death; and then the devise over was good. That the word *die* being the last antecedent, the words, *without leaving issue*, must refer to that. Besides, the testator, who was *inops consilii*, would, under such circumstances, be supposed to speak in the vulgar, common, and natural, not in the legal sense.

He likewise took notice that in a *formedon* in remainder, where a tenant in tail left issue, which issue afterwards died without issue, whereupon such writ was brought, the *formedon* would say that the tenant in tail died leaving issue J. S., which J. S. died afterwards without issue; and so the first donee in tail died without issue. Thus the pleading says that the donee in tail died leaving issue at his death, consequently the words, leaving issue, refer to the time of the death of the tenant in tail; and if the words of a will could bear two senses, one whereof was

more common and natural than the other, it was hard to say the Court should take the will in the most uncommon meaning, to destroy it.

He said the reason why a devise of a freehold to one for life, and if he died without issue, then to another, was determined to be an estate tail, was in favour of the issue, that such might have it, and the intent take place. But that there was the plainest difference between a devise of a freehold, and a a devise of a term for years. For in a devise of the latter to one, and if he died without issue, then to another, the words, if he died without issue, could not be supposed to have been inserted in favour of such issue, since they could not by any construction have it.

29. E. Baxter being possessed of a term for forty years, devised it to trustees, in trust for the testator's wife for life, and after her death to the use of such children as the testator should leave at the time of his death; and in case all his said children should die without leaving any issue, then to the use of J. H. Atkinson v. Hutchinson, 3 P. Wms. 258.

Lord Talbot said, where words were capable of a twofold construction, even in the case of a deed, and much more in that of a will, it was just and reasonable that such construction should be received as tended to make it good. And in this case the devise of the term to the testator's children, and if they should die without issue, then to J. H., might easily and naturally be understood to signify, if they died without leaving any issue at the time of their death; nay, much more naturally than in the other case, viz. if there should be a failure of issue of them a hundred years after. He cited the cases of Target v. Gaunt, and Forth v. Chapman, and decreed in favour ante, § 27, 28.

of the devise over, namely, that the words, "if the first devisee died without *leaving* any issue," must be understood to mean without leaving issue at his death.

Att. Genl. v. Bayley, 2 Bro. R. 553.

30. A person being possessed of a term for years, bequeathed that his brother William Tristram should have the use thereof, for so many years of the term as should expire in his lifetime; and after his decease, his will was, that his executors should permit all and every the child and children of the said William Tristram, their executors, &c. respectively, to hold and enjoy the same, for his and their proper use, during the remainder of said term, in such manner as the said W. Tristram should by his will or deed in writing, &c. direct: and for want of such appointment, then equally share and share alike, without any benefit of survivorship. But if it should happen that the said W. Tristram should die without issue in the lifetime of John and Tristram Tolcher, or either of them, then his will was, that the said John and Tristram Tolcher, if they both survived the said Wm. Tristram, dying without issue as aforesaid, should equally have the benefit and advantage thereof. It was held by Sir L. Kenyon, M. R. that the bequest over was void; but Lord Thurlow reversed the decree.

Goodtitle v. Pagden, 2 Term R. 720.

31. A person possessed of a term for years, bequeathed it to his grandson T. B. Peake, son of D. and S. Peake, and the heirs lawful of him for ever; but in case he should happen to die, and *leave* no lawful heir, then and in that case he gave it, after the death of the said T. B. Peake, to the next eldest son or heir of the said D. and S. Peake. T. B. Peake took possession of the term in question, under the will, and died without issue.

Lord Kenyon said, that on conference with the rest of the Court, they were clearly of opinion that the limitation over was good. This was a chattel interest, limited to T. B. Peake, and the heirs lawful of him for ever: but in case he should happen to die and leave no lawful heir, then over. Now it was apparent on the will, that the testator, by lawful heirs, meant heirs of the body; and that leaving no lawful heir, must be confined to leaving no issue at the time of his death.

32. The following case was sent by the Master of the Rolls for the opinion of the Court of K. B. Wilkinson v. South, 7 Term R. 555.

A person bequeathed a leasehold estate to his wife Mary Parker, during the term of her natural life, and after her decease to go to his son S. Parker, and to the heirs of his body lawfully begotten, and their heirs and assigns for ever; but in default of such issue, then, after his decease, to go to his (the testator's) grandson T. Wilkinson, his heirs and assigns for ever. S. Parker entered on the estate upon the death of the testator, Mary Parker being then dead, and died without ever having had any issue. The question was, whether T. Wilkinson took any thing under the will?

Lord Kenyon.—" We will send our certificate in this case. But I will now state the short ground on which my opinion is founded. The only question is, whether on the fair construction of the words of this will the testator meant that the limitation over to T. Wilkinson the plaintiff should take effect after an indefinite failure of issue in S. Parker, or on a failure of issue living at the time of the death of S. Parker; for as soon as that intention is discovered, there is an end of the case. If personal property be so limited,

that if it were an estate of inheritance, it would give an estate tail, the absolute interest vests in the first taker; but if the limitation be with a double aspect to A. and to the issue of his body, if there be any such issue living at his death, if not then over, it is a good limitation. It was so settled in Sabbarton v. Sabbarton, and a variety of other cases, some of which are not in print. Here the words of the will are, 'to S. Parker and the heirs of his body, and to their heirs and assigns for ever.' If those words stood uncontrolled by any thing subsequent in the will, the absolute interest would have vested in him; but other words are added, 'but in default of such issue, then, *after his decease*, to go to the testator's grandson.' There is a case in the books to show, that *then* and *when* are adverbs of time. Then at what time was the estate to go over to the testator's grandson? at the death of S. Parker, if he left no issue. There is nothing in the will to show that the testator intended that the limitation over should not take effect until future generations; but on the contrary, there is sufficient to show that he intended that the estate should, in one event, vest in the grandson at the time of S. Parker's death, and that is within the time which the law allows in the case of executory devises.

Forrest. 245.

"The rule respecting executory devises is extremely well settled; and a limitation by way of executory devise is good, if it may take place after a life or lives in being, and within twenty-one years and a fraction of another year afterwards. As I before observed, this is a question of intention; and I am clearly of opinion, that the testator's intention was, that if S. Parker did not leave any issue

at his death, the subsequent limitation should take effect."

The Court certified that T. Wilkinson was entitled, under the will of E. Parker, to the absolute and entire interest in the leasehold premises.

No Distinction between Words giving an express Estate Tail, or by Implication. 1 P. Wms. 433. 3 — 268.

33. Mr. Fearne says, a diversity has in some cases been contended for between a limitation of a term, by such words as, in the case of a real estate, would give an express estate tail; and a limitation of the same, by such words as, in the case of a real estate, would give only an estate tail by implication; upon this principle, that where the words of a will, if used with regard to inheritance, would give an express estate tail; there the same words applied to a term, would pass the whole interest in the term. But that where the words of the will, if applied to the freehold, would give an estate tail by implication only, there they would not enure to give the whole interest in that term, and consequently that where a term was limited to one, and if he died without issue, remainder over, this limitation would not vest the whole term in him, as a limitation to the heirs of his body, or to his issue, would do, but were always to be understood restrictively, and to relate only to his dying without issue living at his death, and therefore gave him the term only during his life.

1 P. Wms. 667.

34. The ground of the distinction is this: in respect to an inheritance, the words dying without issue, are taken to mean an indefinite failure of issue in order to create an estate tail in favour of the issue who are capable of taking an inheritance; but with respect to a term, such a construction cannot benefit the issue, because a term cannot descend to them. In some instances the Court seems to have countenanced a distinction of this sort; but in all those

cases there were some circumstances in the will, which the Court observed, confined the generality of the expression, dying without issue, to dying without issue then living. But it has been frequently determined that the limitation of a term over, after a dying without issue, even in such cases where the limitation could only have given an estate tail by implication in a real estate, is to be taken in the legal extent of the expression, and therefore the limitation over being in that sense too remote, is utterly void.

Vide Fearne, Ex. Dev. 233.

Nor between a Devise for Life and an indefinite Devise.

35. It is the same thing whether a devise of a term be to one for life expressly, and if he die without issue, remainder over; or to one indefinitely, and if he die without issue, remainder over.

ante, § 16.

36. Thus, in the case of Love v. Windham, the devise was to one for life expressly, and if he died without issue, remainder over; and yet the remainder was held void.

Clare v. Clare, Forrest. 21.

37. W. Clare being possessed of a long term, devised it to trustees, in trust for his son Thomas Clare, for so many years of the term as he should live; and after his death, in trust for the issue male of his son Thomas, lawfully begotten, for so many years of the said unexpired term as such issue male should live; and when the issue male of his said son Thomas should happen to be extinct, then in trust for his second son, in the same manner.

The question was, whether the limitation over to the second son, after failure of issue male of Thomas, was not void. Lord Talbot held, that the subsequent limitation to the issue of Thomas did not enlarge the express estate for life given to him; but he also held, that the remainder over upon the extinction of issue male of Thomas, which was equiva-

lent to a dying without issue, when taken as an indefinite failure of issue, was void. Vide Fearne, Ex. Dev. 275.

38. An executory devise of a term for years for life to a person *in esse*, to take place upon a dying without issue of another, may be good, because the future limitation being only for the life of a person *in esse*, it must necessarily take place during that life, or not at all; and therefore the failure of issue is in that case confined to the compass of a life in being. An Executory Devise for Life after a general Failure of Issue, is good.

39. W. Wilson being possessed of a term for years, assigned the same to trustees, in trust that he should receive the profits during his life; and after his death for Mary his wife, during her life; and after her death, that John Oates should receive a moiety of the profits during his life; and after his decease, his child or children during his, her, and their lives; and for want of such issue, or after the decease of the child or children of Edward Oates, to permit Sarah Chalfont to receive the profits during her life. Oates v. Chalfont, Pollex. 38.

The question was, whether the limitation to Sarah Chalfont was good; and the Lord Keeper Finch declared, that the trust being expressly limited for life, the same did not tend to a perpetuity, and therefore was good. 3 Atk. 449. Doe v. Lyde, 1 Term R. 593.

TITLE XXXVIII.

DEVISE.

CHAP. XX.

Of other matters relating to Executory Devises.

1. *Where one Limitation is executory, all the others are so likewise.*
5. *A preceding Executory Limitation may be uncertain, when a subsequent one may be certain.*
11. *A preceding Executory Limitation is not a Condition precedent.*
17. *Limitations over after an Executory Devise of the whole Interest sometimes good.*
22. *Distinction between the Cases where a subsequent Limitation may become good, and where not.*
24. *A Limitation which was originally a Contingent Remainder, may take effect as an Executory Devise.*
29. *Distinction between Executory Devises* per verba de præsenti *and* per verba de futuro.
34. *The Freehold descends in the mean time to the Heir.*
37. *And also the Intermediate Profits.*
40. *A Devise of the Residue will pass such Profits.*
43. *Executory Interests are devisable.*
47. *And also assignable.*
50. *May be passed by Fine and released.*
51. *Descendible and transmissible to Heirs and Executors.*
55. *The Court of Chancery will restrain Waste.*
56. *Of Trusts of Accumulation.*

SECTION 1.

Where one Limitation is executory, all the others are so likewise. Exec. Dev. 334.

MR. FEARNE lays it down that where one limitation of a devise is taken to be executory, all subsequent limitations must likewise be so taken. Thus, Serjeant Pemberton says, the several limitations of a devise of one and the same thing shall never be made to operate several ways; viz. some by way of executory devise, and others by way of remainder.

The Court seemed to admit the distinction; but it may be proper to consider upon what reasons it is grounded.

2. With respect to the devise of a term, it is clear that if there be twenty limitations of it after a devise to one for life, &c., every one of the twenty will be equally executory as the first of them; because all are equally limitations of a term, after a disposition thereof for life; which cannot hold otherwise than by way of executory devise. Therefore the question can only arise in regard to the devise of a freehold; and then we are to consider that every executory devise is either the limitation of an estate, after the fee has been already disposed of, or else is a freehold to commence *in futuro*, without any preceding freehold to support it. In the first case it is evident that every limitation subsequent to the first executory devise, must also be executory; because it is also a limitation of an estate after the fee has been already disposed of. In the latter case the first executory limitation, being the first freehold limited by the will, no freehold can vest in possession under that will, before the time appointed for such limitation to take effect; if it could, then would that supposed limitation be really not executory; because it would in that case be supported by a preceding freehold. Idem.

3. It is true that in relation to contingent remainders, a subsequent remainder may vest in interest before a preceding contingent remainder; but that is only where some preceding freehold vests in possession in the mean time. But no subsequent remainder can first vest in possession, and afterwards a preceding estate take place: for wherever a subsequent limitation vests in possession, before a preceding contingent one can arise and vest, such Tit. 16. c. 1. § 49.

preceding one is utterly precluded and destroyed. But in the case now under consideration, there is no freehold limited to vest immediately in possession; we cannot make the preceding estate and the remainder change places, and the latter come into possession before the former; this would be absurd, and directly contrary to the order of limitations. If this cannot be done, then no one of the subsequent limitations can take place, before the time limited for the first; they are all therefore equally freeholds to commence *in futuro*, without any present limitation, or estate of freehold to support them; and consequently they are all equally executory, till the time comes for the first estate to vest, or fail; then all the limitations to persons *in esse*, and ascertained, may vest, and no longer continue executory.

ante, c. 18. § 15.

4. Thus in the case of Gore v. Gore it was held, that till the event of Thomas Gore's having a son should be decided one way or other, by the birth of such son, or by Thomas Gore's death without one, the devise to his son was executory, being a freehold limited to commence *in futuro*.

A preceding Executory Limitation may be uncertain, when a subsequent one may be certain. Fearne, Ex. Dev. 382.

5. A preceding executory limitation may however be uncertain and contingent; when a subsequent limitation, though it be to take effect in future, may not be uncertain or conditional; otherwise than in respect of the possibility of its expiration before the former vests, or fails: but may be so limited as to take effect, either in default of the preceding limitation taking effect at all, or by way of remainder after it, if that should take effect. In either of those cases it must vest at the time appointed for the preceding limitation to vest; for should the preceding limitation fail of taking effect, the subsequent one will then vest in possession: should the

preceding take effect, the subsequent one will at the same time vest in interest as a remainder, upon the preceding one; and then become liable to the same modes of destruction to which other remainders of the same kind are subject.

6. A person devised to trustees and their heirs, to receive the rents and profits till J. B. should attain 21; and if he should live to attain the said age of 21, or have issue, then to the said J. B. and the heirs of his body; but if the said J. B. should happen to die before the age of 21, and without issue, then over. Brownsword v. Edwards, 2 Ves. 243.

Lord Hardwicke, considering the word *and* as used for *or*, and the condition as disjunctive, instead of copulative, decreed that the remainder over should take effect, upon the apparent intent of the testator that it should take place, either in default of J. B.'s attaining 21, or on his dying without issue.

7. A married woman, in pursuance of a power, devised the profits of her estate to her husband for his natural life, and after his death, she bequeathed the said estate to her children, if she should leave any to survive her; but in case she should leave no such child or children, nor the issue of such child or children, and after the decease of her husband, then she gave and bequeathed the said estates to her friend J. H.; making him thereby her sole heir of her last will and testament, in default of issue left by her, and after the death of her husband. Southby v. Stonehouse, 2 Ves. 610.

At the time of making her will the testatrix was with child, and soon after had a daughter, and died.

Lord Hardwicke held, that the child took an estate tail, and not a fee; and that the devise over to J. H. was a vested remainder, and not a limitation to take effect only on the event of the testatrix's dying

without *leaving* any child, or the issue of any, living at her decease. He said the testatrix had only expressed the double contingency which there is in the case of every limitation in remainder after an estate tail; viz. there being no issue at all, or such issue dying without issue.

Collinson v. Wright, 1 Sid. 148.

8. A distinction, however, must be made between cases of this nature, and the case where a testator devised to B. his son and heir; and if he died before 21, and without issue of his body then living, the remainder over, &c. B. survived the 21 years, and then sold the lands, and died. It was held that he had a fee simple immediately; for the estate tail was limited to arise upon a contingency subsequent.

1 Ab. Eq. 188. pl. 8.

9. And also where a person devised lands to his wife, till his son came of age; and then that his son should have the land, to him and his heirs; and if he died without issue before his said age, then to his daughter and her heirs. This was held to be a good executory devise to the daughter, if the contingency happened; and if he lived to 21, though he after died without issue, or left issue, though he died before 21, yet the daughter was not to have the land; because he was to die without issue, *and* before 21, or else the daughter could not take.

ante, § 6.

10. It is observable that in the two last cases the devise to the son was in fee, so as not to admit a regular remainder after it: whereas in that of Brownsword v. Edwards, the first devise was in tail; upon which Lord Hardwicke laid so much stress, as to say, that had the devise been to B. and his heirs, the construction he gave could not, he believed, be made; for where there was such a contingent limitation, he did not know that the Court had changed the word heirs into heirs of the body, to make it so throughout.

11. It has been observed in a former title that where a devise is made upon a condition annexed to a preceding estate; that is, where it is made after a preceding executory or contingent limitation; or is limited to take effect on a condition annexed to any preceding estate; if that preceding limitation or contingent estate never should arise, or take effect, the remainder over will nevertheless take place; the first estate being considered only as a preceding limitation; and not as a preceding condition, to give effect to the subsequent limitation.

A preceding Executory Limitation is not a Condition precedent. Tit. 16. c. 1. § 68. Scatterwood v. Edge. Tit. 16. c. 1. § 75.

12. A person devised a term for years to his wife for life, and after her death to the child she was then *ensient* with; and if such child died before it came to 21, then he devised one third part of the same term to his wife, her executors, administrators, and assigns, and the other two thirds to other persons.

Jones v. Westcombe, 1 Ab. Eq. 245.

One of the questions was, whether the devise to the wife, of one third part of the term, was good; because it appeared she was not *ensient* at all, and so the contingency upon which the devise to her was to take place never happened. And Lord Harcourt held it was good.

13. A case arose in the Court of K. B. upon the same will, and Lord Ch. J. Lee delivered the opinion of the Court—"That the limitation over was good; that the devise to the infant, being ineffectual, was out of the case; and the law the same, whether the devise immediately preceding the limitation over was originally void, or became so by non-existence or nonentity of the person: for that since the law allows such limitations over, it allows the waiting for it. That it was one of those executory limitations which depend on some contingency, on the failure of a preceding limitation, none of which take in all the ways of failing; but still it was the same thing."

Andrews v. Fulham, 1 Ves. 421.

Roe v. Wesket, 1 Ves. 421. 1 Wils. R. 107. 3 Burr. 1624.

14. The above resolution was upon the leasehold part of the estates, which passed by the will. But afterwards the same point, in regard to the freehold lands, came before the Court of C. B.; the Judges of which were of opinion that the event of no child's being born, was a *casus omissus*, concerning which no direction was given by the will; that the rule was, that an heir at law was not to be disinherited, but by express words, or necessary implication; therefore upon that ground the devise over could not take effect.

That the case of Andrews v. Fulham, being a determination on the leasehold, was distinguishable; that the plaintiff there had assented to the devise over, and so was concluded; and that there was a difference of construction between the leasehold and the freehold, because of the favour shown to the heir at law.

Gulliver v. Wickett, 1 Wils. 105.

15. Upon this another ejectment was brought in B. R., where Lord Ch. J. Lee delivered the opinion of the Court, that the devise over was to be considered as a limitation subsequent: the first as a preceding limitation, not a condition, which, whatever way it was laid out of the case, the other took effect. That the true construction of the will was, that there was a good devise to the wife for life, with a contingent remainder to the child in fee, with a devise over; which they held a good executory devise, as it was to commence within twenty-one years after a life in being; and if the contingency of a child never happened, then the last remainder was to take effect, upon the death of the wife; and the number of contingencies was not material, if they were all to happen within a life in being, or a reasonable time after.

Avelyn v. Ward. 1 Ves. 420.

16. Serjeant Urling devised his real estate to his brother G. Urling and his heirs, on this express condition, that within three months after his decease,

his brother should execute and deliver to his trustee a general release of all demands which he might claim on his estate, for what cause soever. But if his brother should neglect to give such release, the said devise to him should be null and void to all intents: and in such case he devised it to Richard Ward, his heirs and assigns for ever.

G. Urling died in the lifetime of the testator. It was decreed that the devise over should take place: and though a distinction was contended for between the case of a remainder over, after an executory particular estate only, and those cases wherein an executory devise was introduced, after a disposition of the whole fee, yet Lord Hardwicke exploded that distinction, because he did not find any authority to warrant it.

17. It seems now to be settled, that whatever number of limitations there may be after the first executory devise of the whole interest, any one of them which is so limited that it must take effect, if at all, within twenty-one years after the period of a life in being, may be good in event, if no one of the preceding executory limitations, which would carry the whole interest, happens to vest: but when once any preceding executory limitation, which carries the whole interest happens to take place, that instant all the subsequent limitations become void, and the whole interest is then become vested.

Limitations over after an Executory Devise of the whole Interest sometimes good.

18. A term for years was assigned to trustees, in trust for husband and wife, during their lives, and the life of the longer liver of them; and if there should happen to be issue male of their bodies living at the time of the decease of the survivor of them, then in trust that the eldest son of that marriage should be maintained out of the rents and profits, until he attained his age of 21 years, and then the

Massenburg v. Ash, 1 Vern. 234—304.

whole term to be assigned to him; and in case he should die before the age of 21 years, then in like manner to the second, third, and every other son of that marriage; but in case there should be no such issue living at the time of the decease of the survivor of the husband and wife, or in case there should be such issue, and they should all die before any of them attained the age of 21 years, then the term was limited to Sir W. Massenburg. The husband and wife died leaving a son, who died an infant.

Lord Keeper North said, that as the rules of Chancery, respecting the limitations of trusts of terms for years, were the same with those by which executory devises of terms for years were governed at law; he would have the opinion of the Judges on this point.

The Judges of the Court of Common Pleas having unanimously given their opinion that the contingent limitation over to Sir W. Massenburg was good, because it must happen within the space of 21 years after a life in being, the Lord Keeper decreed accordingly.*

Higgins v. Dowler, 1 P. Wms. 98. 1 Salk. 156.

19. Alice Higgins devised the premises, being a term for 999 years, to trustees, in trust for herself for life, remainder to H. Higgins her son and Mary his wife, and after their several deceases, in trust for the eldest son of the said H. Higgins, by the said Mary Dowler in tail; and for default of issue of such first begotten son, for all and every the other son and sons of the said Henry Higgins, by the said Mary Dowler; and for default of such issue male of the said Henry Higgins by the said Mary Dowler,

* The present mode of settling terms for years, which has been already stated, Tit. 32. c. 23. §12. is confirmed by this determination.

then in trust for all and every the daughters. There never was a son of the said marriage, but there was a daughter; and the husband and wife being both dead, it was objected that the limitation of the trust to the daughter was void, it being after a limitation in tail to the sons, which in the case of a term was not to be allowed.

Lord Cowper said, there was a diversity, where the limitation in tail had vested, for there, it must be admitted, the remainder over would have been void; but as in this case there never was a son, the remainder to the daughter was good. And it was no more than the limitation of the trust of a term two ways; viz. if there be a son by the marriage, then the limitation is to that son; but if there be no son of the marriage, but a daughter, then to that daughter; and this was not too remote a contingency, because confined to a life in being.

20. Dorothy Lennard being possessed of lands for the residue of a term of 500 years, devised them to a trustee, in trust to permit her nephew Francis Leigh and his assigns to receive all the rents and profits of the premises, for so long as he should live; and after his decease, to the use of his first son and the heirs male of his body; and in default thereof, to the use of his second and other sons, in the same manner; and in default of such issue, to the use of the daughter and daughters of Francis Leigh; or in case of their death before the age of 21 or marriage, then to the use of Edward Stanley, for the then residue of the term. Stanley v. Leigh, 2 P. Wms. 686.

Francis Leigh died without issue; and the question was, whether the limitation of the term to Edward Stanley was good.

Sir J. Jekyll said, he did not think this limitation tended to a perpetuity; such a limitation of an estate in fee simple would have been good; and yet that would have gone farther towards a perpetuity; for the sons, though not *in esse*, must all have taken, one after another, and none of them could have barred the remainder but by a recovery, which required time; whereas in this case the first son would upon his birth have had the whole residue of the term, subject to the precedent interest, vested in him; and it could never have gone over to any remainder-man, if he had died under age, but his executors or administrators would have had it, who could have aliened or assigned it immediately. It was decreed that the limitation over was good.

Tit. 32. c. 23. § 12.

21. In the case of Stephens v. Stephens, the certificate of the Judges, after stating that the devise to the first son of Mary Stephens who should attain the age of 21 years was good; goes on in these words,—"The consequence whereof is, that all the subsequent limitations will be good: the estate will vest in Thomas the son now living, when he shall attain the age of 21 years in tail male, according to the clause directing the order of succession between the sons to be born. If Thomas the son now living should happen to die before the age of 21 years, and the testator's daughter, Dame Mary Stephens, should have any other son by Sir Thomas Stephens, then the estate will go over to him, when he shall attain his age of 21 years, in like manner as it would have vested in Thomas. If Thomas the son should die before the age of 21 years, and Dame Mary should have no other son by Sir Thomas Stephens, who should attain his age of 21 years, then his estate will go over to

ante, c. 17. § 21.

Sarah the daughter, and all the other daughters of the said Dame Mary by Sir Thomas, as tenants in common in tail; with remainder over to Richard Stephens, the testator's brother, in fee. But in case Thomas the son should die before the age of 21, and Sarah the daughter should then be dead, without issue, and there should be no other son of Dame Mary who should attain the age of 21 years, or any other daughter hereafter born of their bodies, then the estate will go to the said Sir Richard Stephens, by virtue of the last remainder to him in fee."

Distinction between the Cases where a subsequent Limitation may become good, and where not.

22. In the foregoing cases it is observable, that wherever a preceding executory limitation carried the whole interest, a subsequent limitation was not considered as a limitation *upon* the preceding, and to take effect after it, but as an alternative, substituted in its room, and to take effect only in case the preceding one should fail, and never take effect at all: and where a preceding executory limitation did not carry the whole interest, a subsequent one was considered either as becoming vested in interest, as a remainder expectant on the preceding estate, as soon as that took effect; or else as taking effect in possession at the time limited for the preceding estate to vest, in case that preceding one failed of taking effect. So that in either case it follows, that if the preceding limitation was not too remote in its creation, the subsequent one could not be so, being to take effect at the time limited for the first, or else not at all. It was therefore necessary to distinguish between instances of this kind, and those cases wherein either the preceding limitation is not executory, but vested, or there is no preceding limitation at all; for in either of such cases, the future limitation cannot be merely an alternative, but is

absolutely limited to take effect, either after the expiration of the preceding limitation; or else, if there be no preceding limitation, upon the happening of some future event. And therefore if the expiration of that preceding limitation be of too remote a nature, the future limitation is void in its creation, and no subsequent accident can make it good; because it is not, as in the former cases, limited to take effect, or to fail, upon the event of a contingency which must be determined one way or other within the period allowed by law for the vesting of an executory devise; but is limited absolutely, to take effect on an event which may not happen within such a period.

Sabbarton v. Sabbarton, Forrest. 245.

23. Thus although in the case of a devise of lands in fee to the first son of A. who shall attain the age of 21, and in default of such issue, remainder to B. in fee; such a limitation would fail or take effect according as the first limitation should vest or not: yet if a devise be to the heirs male of the body of C., and in default of such issue, remainder to D. in tail; here, if we suppose the first limitation void, the subsequent one is an absolute future limitation, to take effect after a dying without issue; and therefore though no heirs male of the body of C. should ever exist, such event will not make good the limitation to D., which was too remote in its creation, and could not be considered, as in the former case, merely as an alternative to a preceding limitation, and which must vest at the time limited for that preceding one to vest, or else not at all.

2 Burr. 878.

A Limitation which was originally a Contingent Remainder may take effect as an

24. It has been stated, that whenever a contingent limitation is preceded by a freehold capable of supporting it, it is construed a contingent remainder, and not an executory devise. But it is possible that the freehold so limited may, by a subsequent accident,

become incapable of ever taking effect at all; as by the death of the first devisee in the testator's lifetime; in which case the subsequent limitation, if the contingency has not then happened, will be in the same condition at the testator's death, that is, at the time when the will is to take effect, as if it had been limited without any preceding freehold. Now in this case it has been held, that where such subsequent limitation could not vest at the testator's death, it should enure as an executory devise, rather than fail for want of that preceding freehold, which had never taken effect. Executory Devise. Fearne Ex. Dev. 492.

25. Mr. Hopkins devised his real estate to trustees and their heirs, to the use of them and their heirs, in trust for Samuel Hopkins for life; and, from and after his decease, in trust for the first, and every other son of the said Samuel, and the heirs male of the body of every such son; and for want of such issue, in case John Hopkins (the father of Samuel Hopkins) should have any other son or sons of his body, then in trust for all and every such son and sons respectively and successively, for their respective lives, with the like remainders to their several sons, with the like remainders to the heirs male of the body of every such son, as before limited to the issue male of the said Samuel Hopkins; and for want of such issue, in trust for the first and every other son of the body of Sarah (the said John Hopkins's eldest daughter) lawfully to be begotten, with like remainders to the sons of John Hopkins's other daughters; and for want of such issue, then in trust for the first and every other son of his cousin Ann Dare, lawfully to be begotten, with like remainders to the heirs male of the body of every such son of the said Ann Dare; Hopkins v. Hopkins, Forrest. 43.

and for default of such issue, then in trust for his own right heirs for ever.

Samuel Hopkins died in the testator's lifetime, without issue; and, some time after, the testator died. Nor had John Hopkins any other son, nor were any of the other remainder-men *in esse* at the testator's death, except a son of Ann Dare's.

Lord Talbot.—" Two questions have been made upon this will. The first is, whether this limitation to the first and every other son of John Hopkins can now take effect as an executory devise? Or, whether it shall be taken as a contingent remainder, and, consequently, void for want of a particular estate to support it by reason of Samuel's death in the testator's lifetime; and that John Hopkins had no son *in esse* at the testator's death, when the remainder might vest? As to the first, I think it impossible to cite any authorities in point: none have been cited. It seems to be allowed, that if things had stood as they did at the time of making the will, the limitation in question would have been a remainder, by reason of Samuel's estate, which would have supported it. So is the case of Purefoy v. Rogers: and limitations of this kind are never construed to be executory devises, but where they cannot take effect as remainders. So, on the other hand, it is likewise clear, that, had there been no such limitations to Samuel and his sons, the limitation must have been a good executory devise, there being no antecedent estate to support it; and, consequently, not able to enure as a remainder; so that it must be the intervening accident of Samuel's death in the testator's lifetime, upon which this point must depend. And, as to that, I am of opinion, that the time of making the will is principally to be regarded,

ante, c. 18. § 8.

in respect to the testator's intent. And if, in this case, we consider it as an executory devise, the intent will be served in case John Hopkins has a second son: but if it is taken as a remainder, the intent plainly appearing that a second son of John Hopkins should take, is quite destroyed, there being no precedent estate to support it as a remainder. The very being of executory devises shows a strong inclination, both in courts of law and of equity, to support the testator's intent as far as possible: and though they be not of ancient date, yet they are of the same nature with springing uses, which are as old as uses themselves. I can see no difference between this case and the others of a like nature that have been adjudged; and if such a construction may be made consistently with the rules of law, and agreeable to the testator's intent, it would be very hard not to suffer it to prevail. In Pay's case, had the testator lived to Michaelmas, the limitation had been a remainder. And if a remainder in its first creation does, by any subsequent accident, become an executory devise, why should it not be good here, upon the authority of that case, where, by the testator's death before Michaelmas, what would otherwise have been a remainder, was held to be good by way of executory devise. I think that, in this case, the limitation would operate as an executory devise, if it was of a legal estate; and therefore shall do so as a trust, the rules being the same."

ante, c. 18. § 2.

26. Soon after the above decree was made, John Hopkins had issue William Hopkins, a second son; upon which it was held, that the executory devise having thereby once vested, the subsequent limitations thereupon became contingent remainders. And though such son afterwards died before the subse-

1 Ves. 269. 1 Atk. 581.

quent limitations vested, yet were they not destroyed; because it was held that the inheritance vested in the trustees was as sufficient to support them, as if there had been estates limited for that particular purpose.

ante, c. 17. 21.

27. In the case of Stephens v. Stephens it was held, that till the estate became vested in some one of the testator's grandsons, who attained 21, the limitations over, to the daughters of his daughters, must have been executory devises. But as soon as ever the estate should become vested in a son, then those subsequent limitations must of course take effect as vested remainders, upon the preceding estate tail in such son.

Brownsword v. Edwards, ante.

Ex. Dev. 498.

28. But when a preceding freehold has once vested, Mr. Fearne says, no subsequent accident will make a contingent remainder enure as an executory devise. This being a direct consequence of the rule above stated, that wherever a devise may be construed a contingent remainder, it shall never be considered as an executory devise.

ante, c. 17. § 11.

Distinction between Executory Devises per verba de Præsenti, and per verba de futuro.

29. It has been held that where an executory devise is limited *per verba de præsenti*, that is, where the devisee is mentioned as a person in present existence, and the commencement of the estate devised is not expressly deferred to a future period; there the devisee must be a person capable at the death of the devisor, otherwise the devise will be void. As if one devise immediately to the heir of J. S., and J. S. is living at the death of the testator; it is said that the devise shall not be construed an executory devise, and therefore must be void; but that if it were to the heir of J. S. after the death of J. S., that would be clearly good as an executory devise, because a future time is mentioned.

1 Salk. 226.

30. So it has been said that a devise to the first son of A., he having no son at the time, is void; but if it were to the first son of A. when he shall have one, it will be good. Though Lord Ch. J. Bridgeman said, that a devise to J. S. for fifteen years, remainder to the right heirs of J. D., is not good; but that a devise to one for fifteen years, remainder to the first son of J. D. is good; because the devisor takes notice that A. has no son, and intends a future act. Id. 229. T. Raym. 83.

31. It has been already stated that a devise to an infant *in ventre matris* is good; and in the case of Gulliver v. Wickett, the Court held that the limitation to the child of which the wife was supposed to be *ensient*, if there had been no devise to the wife for life, being *in futuro*, would have been a good executory devise. ante, c. 18. § 4. ante, § 15.

32. In the case of Chapman v. Blisset, Lord Talbot held that the devise to the unborn children of the testator's grandson, though made *per verba de præsenti*, should take effect as an executory devise, the intention being clearly future. Tit. 12. c. 1. § 30. Doe v. Carleton, 1 Wils. R 225. Harris v. Barnes, 4 Burr. 2157.

33. Mr. Fearne concludes his observations on this subject by saying, that whatever force is to be allowed to the distinction between executory limitations *per verba de præsenti* and *per verba de futuro*; it can only affect those cases where there is not the least circumstance from which to collect the testator's contemplation or intention of any thing else than an immediate devise, to take effect *in præsenti*. Ex. Dev. 520.

34. Where there is an executory devise of a real estate, and the freehold is not in the mean time disposed of, it descends to the testator's heir at law. The Freehold descends in the mean time to the Heir.

35. Thus, in Pay's case, which has been already stated, it was held that the freehold and inheritance ante, c. 18. § 2.

of the lands devised, descended to the heir at law.

Idem, § 3. So in Clarke v. Smith, the estate was held to have descended to the heir of the testator, and continued in him for six months.

ante, c. 18. § 15. 36. In the case of Gore v. Gore, Lord Hardwicke and the other Judges of the Court of K. B., to whom the case was secondly referred by the Court of Chancery, certified that the executory devise was good, "and that the freehold of the said manors, on the death of the devisor, vested in his heir at law."

And also the intermediate Profits. 37. Where there is a preceding estate limited, with an executory devise over of the real estate, the intermediate profits, between the determination of the first estate, and the vesting of the limitation over, will go to the heir at law, if not otherwise disposed of.

ante, § 25. 38. Thus, in the case of Hopkins v. Hopkins it was decreed that till John Hopkins had a son, the rents and profits should go to the heir at law of the testator; and afterwards a son being born to John Hopkins, upon the death of that son, it was decreed that the rents and profits should belong to the heir, till some other person should become entitled under the limitations in the will.

Bullock v. Stones, 2 Ves. 521. 39. A testator devised his real estate to trustees, and willed that the first son of John Stones, when he came to 21, should have it, and his heirs for ever; and that he should be well educated. John Stones had no son when the testator died.

Lord Hardwicke said, this was a good executory devise to the first son of John Stones, when he attained 21; and as to the rents and profits in the mean time, where there was an executory devise, whether of a legal or a trust estate, the rents and profits went to the heir at law; because the legal estate in the one case, or the trust in the other, descended in the mean

time to the heir at law. But this intermediate interest, or benefit arising to the heir at law would determine when John Stones had a son, for that son's education must come out of the rents and profits.

A Devise of the Residue will pass such Profits.

40. But a devise of all the rest and residue of the real estate will pass, as well the profits from the testator's death to the time of the estate's vesting, as those from the determination of the first estate to the vesting of a subsequent one.

ante, c. 17. § 21.

41. Thus in the case of Stephens v. Stephens it was determined, with the advice of the Judges, that the intermediate profits passed to Sir R. Stephens, by force of the residuary devise, as an interest in the real estate not otherwise disposed of.

Rogers v. Gibson, 1 Ves. 485.

42. A testator devised all the rest and residue of his real and personal estate, of what nature or kind soever, to such child or children as his daughter should have.

Gale v Gale, 2 Cox R. 136.

It was held that the profits, from the testator's death to the birth of a child of his daughter, should pass under this devise.

Executory Interests are devisable. ante, c. 3. § 22.

43. It was formerly held that contingent estates in freehold property were not devisable; but it has been already stated that the law is now altered in this respect; and therefore executory estates, and possibilities accompanied with an interest, which would be descendible to the heir of the object of them, dying before the contingent event on which the vesting of the estate depended, are devisable.

44. Executory interests in terms for years were always held to be devisable.

Veizy v. Pinwell, Pollexf. 44.

45. A person possessed of a term for years in lands, devised the same, after his wife's death, to his son. The son made his will, and thereby gave the lands

devised to him by his father's will to the plaintiffs, and died in his mother's lifetime.

The Lord Keeper decreed the lands to be enjoyed by the plaintiffs, according to the will of the son.

Wind v. Jekyll, 1 P. Wms. 572.

46. A. devised a term for years to B. for life, remainder to C., who in the lifetime of B. disposed of this remainder by will.

It was decreed that the bequest was good; and amounted to C.'s, declaring by his will that his executor should stand possessed of the term, in trust for the devisee.

And also assignable.

47. At common law a possibility was held not to be assignable, although in certain cases it might be released; but the Court of Chancery has, in many instances, determined that a possibility of a term for years is assignable.

Thimpland v. Courtenay, 2 Freem. 250.

48. A person possessed of a term for 1,000 years bequeathed it to B. for 50 years, if he should so long live, and after his decease to C., and died. C. assigned it to D. during the life of B.; and this assignment was held good.

Theobalds v. Duffey, 2 P. Wms. 608.

49. A person devised a term for years to his wife for life, remainder to his son and daughter. The daughter and her husband, in the lifetime of the wife, assigned over their moiety; and after the death of their brother they assigned over the other moiety, the mother being still alive.

Vide Wright v. Wright, 1 Ves. 409.

This assignment was established by the Court of Chancery, and also by the House of Lords.

May be passed by Fine and released.

50. Executory interests, or possibilities in freehold estates, may be passed at law by deed, fine, and common recovery, by way of estoppel; of which an account has been already given: and may also be released in certain cases.

Tit. 35. c. 12. § 7.

51. An executory interest, whether in estates of inheritance or terms for years, is descendible, and transmissible to the heirs or executors of the devisee, where such devisee dies before the contingency happens; and if not disposed of before, will vest in such heirs or executors when the contingency happens. Descendible and transmissible to Heirs and Executors.

52. A testator devised to A. and his heirs, and if he died before 21, then to B. and his heirs. A. died before 21, but B. died before him. The question was, whether B.'s heirs should take. And the Court clearly held, that though B. died in the lifetime of A., yet his heirs might well take under the executory devise; for that such a devise was not to be considered as a mere possibility, but as an interest of the same nature as a contingent remainder, and consequently transmissible. Gurnell v. Wood, 8 Vin. Ab. 112. Willes R. 211.

53. George Paynter devised freehold and copyhold messuages to his son George Paynter, his heirs and assigns for ever; but if he should happen to die before he attained his age of 21 years, leaving no issue living at the time of his death, then he devised the same premises to his mother Catherine Paynter, her heirs and assigns for ever. After the decease of the testator, his mother Catherine Paynter died in the lifetime of George Paynter the son, who afterwards died under age, and without issue. Goodright v. Searle, 2 Wils. R. 29. Scott v. Scott, ante, c. 8. § 13.

The question was, whether this executory devise descended to the heir of Catherine Paynter. And it was determined that the lands vested in the heir at law of Catherine Paynter, upon the happening of the contingency, viz. upon the decease of George Paynter under age, and without isrue.*

* This case has been confirmed by a recent judgment of the Court of C. B. Goodtitle v. White, Bos. & Pul. N. R.

The Court of Chancery will restrain Waste.

54. In cases of contingent or executory interests, the Court of Chancery will interfere in behalf of those who are entitled to such interests, to prevent unreasonable waste being committed by the persons in possession.

Robinson v. Lytton, MSS. Rep. 3 Atk. 209.

55. Robinson Lytton devised all his estates, out of settlement, to the defendant his only son, and to his heirs and assigns for ever. And in case his said son should not live to attain the age of 21 years, leaving no issue by him lawfully begotton, then and in such case he gave his said estate to his first and every other daughter in tail. And he further directed, that in case his said son should attain the age of 21, his estates in London, Sussex, &c. should be sold; and the monies arising from such sales he gave to all his daughters, the plaintiffs, in equal proportions, as an addition to their fortunes; and in case one or more of his said daughters should die, then her share to go to the survivors.

The testator died in 1732, and the defendant his son, being still under age, and going to cut down timber, the plaintiffs brought their bill for an injunction to stay the defendant from falling timber, as contrary to their father's will, who intended them the whole benefit of the estates in question, in case his son should attain to 21.

For the defendant it was insisted, that by the express words of the will he had the fee in him, which could be divested only upon a contingency that might never happen; and that the Court would not restrain a person, having the inheritance, from committing waste. That it was unreasonable to put a man in a worse state with regard to his own interest, because after his own interest determined, he had one for a third person, and cited Savil v. Savil.

Lord Hardwicke.—If the defendant has a legal right to cut down timber, and there be no equitable circumstances in the case, he ought not to be restrained from the exercise of this right; but if there be any such, he ought. I did not think fit to determine the matter upon a petition, but thought it proper for a bill. As to the testator's intent, he never meant that his son should, before he attained 21, fell all the timber on these estates, which were devised to be sold, for the increasing his daughters' portions; and it might happen that the value of the timber, when felled, would equal, or perhaps exceed that of the land: and his meaning must have been to give it of the same value it was at his death; which must be the same timber that was on it at that time. Suppose the greatest part of this estate were meadow ground, and the defendant was going to plough it, by which he would greatly increase his present profits, but reduce the value of the land, by turning it into arable; would not the Court in such case grant an injunction? Certainly it would. The testator has given his son these estates only for a time, during which, in supposition of law, no waste will be committed; that is, till the defendant attains 21. For what guardian could cut down timber, and by that means turn part of the inheritance into personal estate? and this is a very material circumstance with regard to the testator's intent. The next consideration is, what are the words of this will, which, putting the two clauses together, amount to a gift of all his estates, which he had power over, to his son for ever; and that in case his son shall attain 21, then that the estates shall be sold, and the monies arising therefrom he gives to his daughters, by way of augmentation of their portions. Upon which it was said, by the

plaintiff's counsel, that the defendant is to be considered as a trustee of the inheritance, for the benefit of his sisters; and I am of opinion he is so, taking the profits to his own use until he attains 21. This Court has gone greater lengths in granting injunctions to stay waste than the courts of law have in granting prohibitions against waste; as where there has been an interposing estate for life, remainder in fee, in which case no action of waste lies, during the continuance of the mesne remainder, 1 Inst. 54. And injunctions have been granted to the remainder-man, notwithstanding the interposing estate for life. So where there has been tenant for life, remainder for life, without impeachment of waste, remainder in fee, the Court has restrained the remainder-man for life, during the continuance of the first estate for life, because of the possibility of his dying before the first tenant for life. The like in mortgages, where a mortgagor has been in possession, the Court has restrained him from cutting down timber, without inquiring whether the estate itself was sufficient to answer. Now this is much stronger in the case of a trustee; and here it is the same as if he had, said "I give this estate to my son and his heirs, to the intent he may receive the profits till 21; and after 21, then to be sold for my daughters portions." In which case the Court would certainly have restrained the defendant.

Tit. 3. c. 2. § 35.

Tit 15. c. 2. § 16.

There are three kinds of interest taken notice of in this Court—The legal estate at common law; the use, which now by 27 Hen. VIII. draws the legal estate to it; and the beneficial interest. Now how does it stand upon this devise? The legal interest is in the defendant; and as to the beneficial interest, that belongs to him till 21, and then the whole is a trust for the benefit of other persons. If he does not

attain 21, and leaves no issue, the estates go according to the several remainders limited thereon: if he does, they are to be sold for augmentation of his daughter's fortunes. It would therefore be unreasonable to suffer him to take away a considerable part of the value of estates intended for daughters' portions: nor will the Court enter into the value of these portions, nor of the proportion they bear to the son's estate; the father being the proper judge of the division of his property in his family.

Several cases have been put upon waste, which have never been determined; only the Court *arguendo* has said it would do so or so. As that of an infant in *ventre sa mere*, where the estate descends in the meantime to the next heir. It has been said several times that the Court would grant an injunction to restrain the heir from waste; and I should certainly do it. So, in such executory devises as must take place within a reasonable compass, as in Gore v. Gore, where the freehold descends in the meantime, I doubt whether such an heir should be permitted to commit waste, and think he ought to be restrained. This injunction therefore must be made perpetual, there being no other way to preserve the benefit which the testator intended his daughters; but without costs on either side.

ante, c. 18. § 15.

56. It has been determined in a late case, that a testator may direct the rents and profits of an estate, whereof an executory devise is made, to accumulate till the time when such estate becomes vested; and that the doctrine of executory devises, as to the time when they must vest, was applicable to a trust of accumulation.

Of Trusts of Accumulation.

57. Peter Thellusson being seised of very considerable real estates, and of a very large personal estate,

Thellusson v. Woodford, 4 Ves. Jun. 227.

and having three sons, Peter Isaac Thellusson, George Woodford Thellusson, and Charles Thellusson, devised all his manors, messuages, lands, tenements, and hereditaments to trustees, their heirs and assigns for ever, upon the trusts therein-after mentioned; and as to the residue of his personal estate, he gave and bequeathed the same to the same trustees, their executors, administrators, and assigns, upon trust that they should, as soon as conveniently might be after his decease, invest the same in the purchase of freehold estates of inheritance, upon the trusts therein-after mentioned. And he directed that his trustees, their heirs and assigns, should stand seised of the real estate devised to them, and of the estates directed to be purchased, upon trust to receive the rents and profits of them during the natural lives of his sons Peter Isaac Thellusson, George Woodford Thellusson, and Charles Thellusson, and his grandson John Thellusson, son of his said son Peter Isaac Thellusson, and of such other sons as his said son Peter Thellusson then had or might have, and of such issue as his said grandson John Thellusson might have, and of such issue as any other son of his said son Peter Isaac Thellusson might have, and of such sons as his said sons George Woodford Thellusson and Charles Thellusson might have, and of such issue as such sons might have, as should be living at the time of his decease, *or born within due time afterwards*, and during the natural lives and life of the survivors and survivor of the several persons aforesaid. The testator then directed that his trustees should from time to time invest the money to arise from such rents and profits in such purchases as he had therein-before directed to be made with his personal estate; and that they should from time to time collect, receive, lay out, and invest the rents and

profits of those estates in the same manner. And he directed his trustees from time to time to cut such timber on the estate devised and to be purchased, as should be fit to be cut, and to sell the same; and to invest the money arising by such sales in such purchases as were therein-before directed to be made: and he empowered the trustees to make leases, and generally to act in the management of the trust estates, as if they were their own. He then directed, that after the decease of the several persons during whose lives the rents and profits of the estates devised and to be purchased were directed to accumulate, an equal partition should be made by the trustees of the estates; and that the whole thereof should be divided into three lots of equal value: and he then directed the manner in which those lots should be limited; which, as to the first of the lots, is expressed in the following words: "I do hereby direct that the premises contained in one of such allotments, shall be conveyed to the use of the eldest male lineal descendant then living (and who shall be entitled to the first choice of such allotments) of my said son Peter Isaac Thellusson in tail male, with remainder to the second, third, fourth, and all and every other male lineal descendant or descendants then living, who shall be incapable of taking as heir in tail male of any of the persons to whom a prior estate is hereby directed to be limited, of my said son Peter Isaac Thellusson, successively in tail male; with remainders, in equal moieties, to the eldest and every other male lineal descendant or descendants then living of my said sons George Woodford Thellusson and Charles Thellusson, as tenants in common in tail male, in the same manner as herein-before

directed with respect to the eldest and every other male lineal descendant or descendants of my said son Peter Isaac Thellusson, with cross remainders between or among such male lineal descendants as aforesaid of my said sons George Woodford Thellusson and Charles Thellusson, in tail male; or in case there shall be but one such male lineal descendant, then to such one in tail male, with remainder to the use of them the said Matthew Woodford, James Stanley, and Emperor John Alexander Woodford, their heirs and assigns for ever, upon the trusts, and to and for the intents and purposes hereinafter mentioned, expressed, and declared of and concerning the same."

He then directed the estates included in one other of such allotments to be conveyed to the use of the eldest male lineal descendant then living (and who was to have the second choice of such allotments) of his son George Woodford Thellusson in tail male; with similar remainders to the second, third, fourth, and every other male lineal descendant or descendants of the said George Woodford Thellusson successively in tail male; and with similar remainders, in equal moieties, to the eldest and every other male lineal descendant or descendants then living of the said Peter Isaac Thellusson and Charles Thellusson, as tenants in common in tail male, with similar cross remainders; and with the ultimate remainder in the same manner, to the use of the trustees in fee-simple, upon the trusts therein-after mentioned.

He then directed the estates included in the remaining lot to be conveyed to the use of the eldest male lineal descendant then living of his said son Charles Thellusson in tail male, with similar re-

mainders to the second, third, fourth, and every other male lineal descendant or descendants then living of his said son Charles Thellusson, successively in tail male; with remainders, in equal moieties, to the eldest and every other male lineal descendant or descendants then living of the said Peter Isaac Thellusson and George Woodford Thellusson, as tenants in common in tail male, with similar cross remainders; and with the ultimate remainder in the same manner to the use of the trustees in fee simple, upon the trusts therein-after mentioned.

And he directed that the trustees, their heirs or assigns, should stand and be seised of the estates by him devised and so to be purchased as aforesaid, upon failure of male lineal descendants of his said sons Peter Isaac Thellusson, George Woodford Thellusson, and Charles Thellusson as aforesaid, in trust to sell all the said estates, and to pay the money to arise from the said sales unto his Majesty, his heirs and successors, kings and queens of England, to be applied to the use of the sinking fund, in such manner as should be directed by act of parliament.

The testator died in 1797, leaving his said three sons; the eldest of whom had then three sons and two daughters, the second two daughters, and the third one son; and the wife of the eldest son was then with child, and was soon after delivered of twin sons.

Some time after the decease of the said Peter Thellusson, two suits were instituted in Chancery, respecting his will; one of them was upon a bill, filed by his widow and children against the acting trustees and executors of his will, and against the two sons of the said Peter Isaac Thellusson born

after the testator's decease, and also against his Majesty's Attorney General, praying to have the trusts of the will declared void, and the real estate conveyed to the said Peter Isaac Thellusson, as heir at law of the testator, and the personal estate divided among the plaintiffs, according to the statutes of distribution. The other of the suits was instituted upon a bill filed by the acting trustees and executors of the will of the said Peter Thellusson, against all the other persons, who were parties to the first suit, praying to have the trusts of the will established and carried into execution, and the necessary directions to be given for that purpose. Both the original cause, and the cross cause, came on before Lord Loughborough in Lincoln's Inn Hall, in December 1798, assisted by the Master of the Rolls (Sir R. P. Arden), Mr. Justice Buller, and Mr. Justice Lawrence, and was argued at great length *. And on the 19th of February following he pronounced his decree in both causes, and thereby dismissed the bill in the original cause, so far as it prayed that the limitations and dispositions contained in the will of the said Peter Thellusson of and concerning his real estates, and the general residue of the personal estate, and the rents, issues, and profits of such estates, and concerning the estates directed to be purchased, and the rents and profits thereof, and the trusts thereof might be declared void; and declared in the cross cause, that the will ought to be established, and the trusts of it performed and carried into execution; and declared the devises and limitations of the estates contained in the will to be

* Mr Hargrave's argument has been published by himself, to which the reader is therefore referred.

good and valid in the law, and gave directions accordingly.

From this decree the three sons of Mr. Thellusson, the testator, appealed to the House of Lords: and on their behalf it was contended that the trust attempted to be created by Mr. Thellusson's will, being of the class of executory trusts created by will, must depend for its validity on its being instituted for those purposes, and limited within those boundaries, which the law prescribes for trusts of that description; but it was neither instituted for those purposes, nor limited within those boundaries.

1st. It was not instituted for the purposes which the law prescribes for those trusts. The nature of it was, to create an equitable estate of inheritance commencing at a future time, without limiting an intermediate equitable estate commensurate with the interval. By the old law, limitations of this kind were illegal. For the purpose of enabling parties to provide for those reasonable occasions of families, which could not be provided for, except by allowing future estates of freehold to be limited without a limitation of such a previous intermediate estate, they were first admitted into wills: and afterwards, when uses were introduced, the uses raised by them were admitted among those, which, on account of the fairness and utility of their object, courts of equity thought binding on the consciences of trustees, and the performance of which they would, on that ground, compel by a subpœna. Thus, the circumstance of their being created for the meritorious purpose of providing for the reasonable occasions of families, was the ground on which the uses, raised by these limitations, were admitted among those which courts of equity would execute; and, of course, when they

were not created for a purpose of that nature, the ground for the interference of courts of equity did not arise. In the present case there was no such ground. Mr. Thellusson's will was morally vicious, as it was a contrivance of a parent to exclude every one of his children from the enjoyment, even of the produce of his property, during almost a century; and it was politically injurious, as, during the whole of that period, it made an immense property unproductive, both to individuals and the community at large; and by the time when the accumulation shall end, it will have created a fund, the revenue of which would be greater than the civil list, and would therefore give its possessor the means of disturbing the whole economy of the country. The probable amount of the accumulated fund, in the events which had happened, was stated in the appellant's bill, and admitted in the answer, to be 19,000,000*l.*; and, in case any of the persons answering the description of heir male, when the period of suspense ended, should be a minor, and his minority should continue 10 years, it would increase the amount of that third to the sum of 10,802,373*l.*; so that, if the whole property should center in one person, and that person should have a minority of 10 years after the end of the period of suspense, (a circumstance by no means improbable,) particularly as Mr. George Woodford Thellusson had been long married and had no son), the whole accumulated fund would amount to 32,407,120*l.*

2d. The trust was not confined within that boundary which the law prescribes for trusts of this description, even though it should be admitted that all the lives, during which the accumulation was to be carried on, were in existence at the time of Mr. Thellusson's decease, as one circumstance, which materially

affected the period of suspense, and which entered into every case in which the suspense of property had been held legal, did not enter into the present case.

In examining the cases decided on limitations of this kind, it would appear, that in every one of them, all the lives during which the suspense was directed to be carried on, were evidently the lives of persons immediately connected with, or immediately leading to, the person with whom, under the trust first limited to take effect at the end of the suspense, the property was to vest. Thus (to instance two cases in which the accumulation was supposed to have been furthest carried on), in that on Lady Dennison's will, Miss Midgley, during whose life the property might be in suspense, was the mother of the second son to whom the property was devised. And in Long v. Blackall, the testator's posthumous son was immediate ancestor to the heir, in whom the property was directed to vest; but, in the present case, not one of the first lives had an immediate connection with, or immediately led to, the person benefited. In the sense here spoken of, the life of any stranger was equally connected with and would equally lead to "the respective male descendant of the testator's son," as the lives assigned by him for the period of suspense. A material difference, therefore, in a point considerably influencing the purpose and boundary of the suspense, existed between the present and all the decided cases.

In the Register's Book, under the Title of Harrison v. Harrison, 21st July 1786. 7 Term R. 100.

3d. The use made by Mr. Thellusson of the rule allowing a suspense of property to be carried on for any number of lives in being, was a fraud on the rule. It was a maxim of law, which admitted of no exception, that nothing should be effected by indirect

means which could not be done in a direct manner. Now a possible suspense of property for 25 years was held to be void in Sir John Lade's case; and, in the late case of Proctor v. the Bishop of Bath and Wells, the Court of Common Pleas unanimously decided against the legality of a possible suspense of property for 24 years. Where property was suspended through the medium of lives, if the lives were those of persons connected with the ultimate owner, the persons whose lives formed the period of suspense, would generally be the parents of the party ultimately benefited, and would not therefore be more than one or two lives at the utmost. Now the probable duration of one or two such lives falls short of 21 years; but, if an unlimited number of lives were taken, they would reach a century. It was observable, that the probable duration of the lives assumed by Mr. Thellusson reached 70 years. Thus, therefore, if the rule were taken to extend to any number of lives, it would follow, that though, where a number of years directly constituted the term of suspense, property could not be prevented from vesting absolutely during 25 years, according to the determination in Sir John Lade's case, or during 24 years, according to the case of Proctor v. the Bishop of Bath and Wells; yet, by assigning for the period of suspense a number of lives, whose average duration would be equal to a given number of years, and thus indirectly making years, not lives, to constitute the period of suspense, property might be suspended for a whole century; and the present would be cited, on future occasions, as a case in point for extending the period of suspense to 70 years. Thus Mr. Thellusson's will was a fraud on the rule. When, in the Duke of Norfolk's case, Lord Nottingham pro-

Lade v. Holford, Amb. 479. 3 Bur. 1416.

Proctor v. Ep. Bath and Wells, 2 H. Black. 358.

Duke of Norfolk's Case, 3 Cha.

nounced for the legality of an executory limitation, which kept the absolute ownership of a term for years in suspense for one whole life, and thereby extended the period allowed for the suspense of a term beyond what had been settled for it in the preceding case of Child v. Bayley, the possibility of the abuse of that extension of executory limitation was strongly pressed upon him: and he answered it in these remarkable words: "It has been urged at the bar, Where will you stop, if you do not stop at Child v. Bayley's case? I answer, I will stop every where, where any inconvenience appears; no where before. It is not yet resolved what are the utmost bounds of limiting a contingent fee upon a fee; and it is not necessary to declare what are the utmost bounds to a springing trust of a term: whenever the bounds of reason or convenience are exceeded, the law will be quickly known." The use made by Mr. Thellusson of the will is, both in a private and public view, unreasonable and inconvenient; and it is still more objectionable, as, by carrying on indirectly an accumulation for 70 years, which directly could not be carried on for one-third of such a number of years, it was a fraud upon the rule itself. Thus, therefore, the time pointed at by Lord Nottingham was come; and it was necessary that it should be known, that the rule was to be understood with this limitation, that whenever, from the number and quality of the lives chosen, it is evident that accumulation, and not a family purpose, was the object of the trust, the bounds of the reason and convenience of the rule were exceeded, and a fraud has been practised on the rule. It was objected to this conclusion, that any inquiry into the reasonableness, convenience, or fairness of the use made of the rule,

Ca. 1. 2 Cha. Rep. 229. 2 Free. 72. 80. Pal. 223. and Ld. Nottingham's MSS. Rep. in Mr. Hargrave's Possession. Cro. Jac. 459. 1 Roll. Ab. 611. Palm. 48. 333.

must lead to uncertainty, and to an exercise of discretion which the Bench has always disclaimed: but this did not always follow. As much uncertainty, and as great an exercise of discretion, attends all decisions upon unconscionable contracts, as will attend decisions on the reasonableness, convenience, and fairness of the use made of the rule in question. A contract might be objectionable for its unreasonableness and unfairness, without being objectionable on the ground of either to such a degree as will induce a court of equity to rescind it; but still there is a degree in which equity will interfere. "To set aside a conveyance, there must," as Lord Thurlow said in the case of Gwynne v. Heaton, "be an inequality so strong and so complete, that it must be impossible to state it to a man of common sense, without producing an exclamation of the inequality of it." So, in respect to the rule in question, it may be much abused, without a court's being justified in taking notice of the abuse: but when the abuse is so strong, gross, and complete, that every man of common sense, to whom it was stated, must exclaim against it, the case supposed by Lord Nottingham was come, and equity would interfere to set it aside. That the rule had been strongly, grossly, and completely abused in the present case, appeared not to be doubted.

1 Bro. Cha. Rep. 1.

4th. The trust was not limited within those boundaries which the law requires for trusts of this description, because the will attempts to protract the accumulation during the lives of persons unborn at the time of the testator's decease; the testator having selected for that purpose the lives of such persons as might not be born "till within due time after his decease;" and the persons thus described

could not be considered as persons actually born in his lifetime.

It was true that for some purposes, as at the common law, to take by descent, and by the 10 & 11 W. III. c. 16. to take by way of remainder, a child, who is *in ventre sa mere*, when the estate designed for him would devolve upon him if he were born, becomes entitled to it after he is born, and may then enter upon it, and divest it from the first taker. But his title to enter upon the estate, after his birth, was not a consequence of his supposed existence during the time he was *in ventre sa mere;* but because, in the case of his taking by descent, the law, at the instant of his birth, invests him, though a posthumous child, with the character of heir, and, consequently, with all the rights of heirship; and because, when he claims by way of remainder, it is expressly provided by the 10 & 11 W. III. c. 16. that the remainder shall vest in him upon his birth. If the law considered him to exist before his birth, the freehold, during the time of his being *in ventre sa mere*, would be vested in him in the eye of the law, and for the purposes of law; but that clearly was not the case. For while he was *in ventre sa mere*, the law vested the freehold in the intermediate taker as heir, with every right and burthen of heirship; so that, after the birth of the nearer heir, he even retained the profits of the estates against him. That class, therefore, of lives, which was now the subject of observation, neither had nor could have an existence, either in fact or law, in the time of Mr. Thellusson. It followed that, by the admission of them into the term of suspense, the ground prescribed by law for the suspense of real property had been exceeded. No cases, the subject of which was real property, could

be mentioned, in which a child *in ventre sa mere* had been held to be in existence for any purpose, except to limit the estate of the first devisee, or for the child himself, being the substituted devisee. In Bennett v. Honeywood, Lord Bathurst declared, that the Court had never construed a child *in ventre sa mere* to be actually born, at the time of the death of the testator, except in a case of devise to the children. Cases upon trusts of personal estates were not applicable to cases of the present description, arising on devises of real estates: for though rules of law, which require that an estate of freehold should be actually vested in some person, and therefore deny a legal existence to a child *in ventre sa mere*, even for his own benefit, were in nowise applicable to trusts of personal estate. The case of Long v. Blackall was the only case where the lawfulness of making a child *in ventre sa mere*, a life, for the purpose of suspense, seemed to have been admitted: but that was a case of personal estate. Now, as there was no law which denied a legal existence to a child *in ventre sa mere*, where personal estate was concerned, there seemed (especially where, as in Long v. Blackall, it gave effect to a provision made by a parent for a child), that there was strong ground to contend that a child *in ventre sa mere* should, in the eye of the law, be supposed to exist for his own benefit, and that there should be a strong disposition in the courts to favour such an argument; but, in the present case, from the mere impossibility of supposing the freehold to be in the child while *in ventre sa mere*, the argument was wholly inadmissible.

Amb. 708. 712.

Admitting, however, that the lives in question were, for some purposes of law, in existence in the lifetime of Mr. Thellusson, they certainly were not

in existence for the use he made of them. In the cases where the nine months have been mentioned, as a period allowed for protracting the suspense of property, it was generally added that the nine months were allowed, for the sake of the child intended to be benefited by the protraction; but a single instance could not be produced where the nine months have been added for any other purpose; and perhaps an instance could not be brought where the courts have had occasion to mention the nine months, without adding at the same time that they were allowed merely for the benefit of the posthumous child. Then, how does the argument stand? A posthumous child is, in fact, unborn at the testator's decease; the law allows that, when after his birth he answers the character of heir taking by descent, and also that in some cases especially provided for by act of parliament, his being *in ventre sa mere* shall not deprive him of an estate, to which, if actually born at the time of its devolution, he would have been entitled. To argue from this, that for all purposes, and particularly for the purposes which, as in the present case, operate to their prejudice, posthumous children should, in the supposition of law, be thought in existence, was unjustifiable.

5th. In other respects, the suspence evidently extended beyond the lives of persons in being at the testator's decease.

The classes of lives are described by the testator in the following words:

(1st.) "During the natural lives of my sons Peter Isaac Thellusson, George Woodford Thellusson, and Charles Thellusson."

(2d.) "And of my grandson John Thellusson, son of my said son Peter Isaac Thellusson."

(3d.) "And of such other sons as my said son Peter Isaac Thellusson now has or may have."

(4th.) "And of such issue as my grandson John Thellusson, son of my said son Peter Isaac Thellusson may have."

(5th.) "And of such issue as any other sons of my said son Peter Isaac Thellusson may have."

(6th.) "And of such sons as my said sons George Woodford Thellusson and Charles Thellusson may have."

(7th.) "And of such issue as such sons may have, as shall be living at the time of my decease, or born in due time afterwards."

The question was, whether all the lives mentioned in this part of the will must necessarily have been in existence in the lifetime of the testator, or whether some of them might come into existence after his decease? On the last supposition, the devise was evidently too remote. Now, unless the words in the third, fourth, fifth, sixth, and seventh members of the sentence, were restrained by the qualifying words, "as shall be living at the time of my decease, or born within due time afterwards," which were introduced at the end of the last member of the sentence, they manifestly extended to persons who might be born after Mr. Thellusson's decease. But the qualifying words could not, upon any principle, either of grammatical or legal construction, apply to them. In common sense, by every rule of grammar, and according to every principle and precedent of legal construction, words of relation are always exclusively referred to the next immediate antecedent; unless such exclusive reference embarrasses the sentence. But, in the present case, the sentence will not only not be embarrassed, by confining the reference

in the last member of the sentence to the next immediate antecedent in that sentence, but the sentence will be embarrassed in an extreme degree, by extending the reference to any prior member of it. It will not be embarrassed by confining the reference to the last antecedent in the last member of the sentence, for every member of the sentence will then be complete in itself; every member will have its word of relation, and an antecedent word, to which it explicitly refers: but it will be embarrassed in an extreme degree, by extending the reference to the prior members of the sentence. The restrictive words could not be applied to the first or second members of the sentence, without making them absolute nonsense: this alone leads to the conclusion, that they were not to be referred to the other members of the sentence, especially, as without them, and standing by itself, each of those members is perfect. If the restrictive words were referred to the third and fourth members of the sentence, one half of them must be omitted, or the reference would make them perfect nonsense: for the words, "born in due time afterwards," could never be referred to the words, "now has;" as it is impossible that a testator, speaking of sons living when his will is made, can describe them as sons who may be born in due time after his decease. The fifth member of the sentence was complete without the restrictive words; they did not however make nonsense of it, but then they left it altogether open to the force of the objection, as, by every rule of construction, the restrictive words, if they were applied to that member of the sentence, must be referred to the "sons" mentioned in it, and not to "the issue of the sons." It was impossible to suppose that a testator, of the age of sixty-four at the time he made his will, should have had it in his con-

templation to provide for the event of there being in existence, at the time of his decease, a son of an unborn grandson of his body; yet to that supposition the reference of the restrictive words to the word "issue," in the 5th member of the sentence, necessarily led. Now, if they were referred to the word "sons," the word "issue" was left unqualified; and then, among the lives, during which the period of suspense was to be carried on, all the issue of the sons must be reckoned, whenever such issue should be born. It was apprehended, that this was the only admissible construction; and that the legal boundary of suspense was therefore exceeded.

6th. Finally, the testator exceeded the bounds prescribed by law for the suspense of property, in the clause by which he directed the property to be vested in the funds till purchasers could be found. The proper and only legal mode of declaring the trusts of these investments, for the purpose probably in the contemplation of the testator was, directing the dividends, and the annual produce of them, to be applied to the persons, and in the manner in which, if lands were actually purchased and settled, conformably to the trust, the rents of them would be applicable. This the testator did not do; but, on the contrary, directed the accumulation to be carried on till the purchases were actually made: so that the beneficial ownership of the property would be suspended, not only till all the lives, during which it was directed to accumulate, should expire, but during such further period as might elapse between the decease of the last surviving life and the completion of the last purchase.

On the other side it was contended, on behalf of his Majesty and the public, that the decree should be affirmed, for the following reasons:

1st. That the only question was, whether the testator had transgressed any of those rules of law or equity which were sanctioned and established by decisions of courts of justice at the time when he made his will? That an executory devise was good which was to take effect in possession, after the determination of any number of lives of persons actually born, and after the death of a child *in ventre sa mere* (allowing for the period of gestation of such child), was a rule which could not now be shaken, without shaking the foundation of the law. In the present case, on the determination of only nine lives, there would be a vested estate in possession; and the vesting therefore of the property in question was not postponed for a longer period than the law allowed. That there was nothing in this case which, in technical language, tended to a perpetuity. An estate might be limited to one for life, remainder to another for life, remainder to a third, and so on to twenty persons for life; nay, a settlement had, by the directions of a court of equity, been made, limiting an estate to fifty persons in being, for their successive lives, and no inconvenience had ever been apprehended from such limitations. The rule had been laid down in plain and intelligible terms, with reference to the very circumstance of the number of lives; that it did not signify how great the number of lives was, for it was but for the life of the survivor, and therefore for the life of but one person. A man might appoint 100 or 1000 trustees, and that the survivor should appoint a life estate, that would be within the line of a perpetuity. The Judges had never been aware of the difference between one life and twenty lives. Every executory devise was good that did not tend to make an estate unalienable be-

Love v. Wyndham, Sid. Rep. 450. 3 Cha. Ca. 29.

Humberston v. Humberston, 1 P. Wm. 332. Scattergood v. Edge, Salk. 229. 2 Bro. Cha. Ca. 30.

yond the period allowed by law as to legal estates, which could not be rendered unalienable beyond the time at which the remainder-man, who was not in existence at the time of the limitation of the estate, would arrive at the age of twenty-one. The Court had no criterion to judge of the inconvenience arising from restraining the alienation of property by executory devise, except by analogy to the restraint which the common law allowed to be put on the alienation of real property.

2d. That the notion, that an executory devise was good or bad according to the number of lives after which it was to take effect, never occurred to any judge or lawyer until the present case, nor could such a notion be supported, unless it should be determined that a Judge was to decide upon the particular circumstances of each particular case, and that he was not to look for a general rule, but for particular instances in which the general rule had been acted upon. That in the Duke of Norfolk's case, Lord Nottingham, so far from deciding upon the principle, that executory devises must depend upon the rule of convenience or inconvenience, had positively declared, that he intended to confine executuory devises and trusts within the limits of estates tail, and without any exception, he gave the same limitation to executory devises, and trusted that the extent of the property, the cruelty or kindness of the disposition, could not be permitted to operate upon the decision of a court of justice. The intention of this case was clear and certain; it was consistent with the rules of law that intention could not be controuled by ideas of its fitness or unfitness, of its policy or impolicy; the intention of the testator was consistent with the settled rules of law at the time

when his will was made, and therefore the will must be established.

3d. That the objection, that the doctrine of executory devises was not applicable to a trust of accumulation, was totally unfounded; the intention of a court of equity had been frequently directed to a trust of accumulation. There were many cases in which accumulation had been directed by the Court, because the testator had directed it expressly; others in which it had been directed because the will contained indications of such an intention; and others in which the intention of the Court had been so particularly called to the legality of the accumulation directed, as to fix the period, beyond which such accumulation was not to extend; the objection had never been before made, even in argument, except in the case of Lady Dennison's will, when it was raised in argument, but without success. That it had always been considered as in the power of a testator to direct an accumulation of the rents and profits of his estates for the same period of time, during which the law allows a testator to render his estate unalienable. If that was not the period during which the trust of accumulation was to continue, what other period was to be substituted? Might the accumulation be permitted for one life, or for three lives, or for twenty? Different Judges might entertain very different opinions upon the subject; one good life might be more than equal to fifty bad lives. The rule therefore which could be neither extended nor contracted, was laid down by the law; and was, that accumulation might go on during that period of time, during which the law permitted the estate to remain unalienable: the law did not regard the quantity of property accumulated, but anxiously

Hopkins v. Hopkins, Talb. Rep. 44.

Gibson v. Rogers, 1 Ves. 485.

Harrison v. Harrison, 21st July 1786.

provided that, when accumulated, it should not remain unalienable beyond a period clearly marked out and ascertained.

4th. With respect to the objection, that a child *in ventre sa mere* was not a life in being for the purpose of suspending the absolute vesting of an estate, it was clear that such children were considered by the law as in being for a variety of purposes. They were considered as in being at the death of an intestate, in order to be entitled to take under the statute for distribution of an intestate's estates; they were capable of taking by descent estates in fee-simple or in fee-tail. It was admitted, that they were to be considered as in being for all purposes and in all cases for their own benefit; but it was said, that they were not considered as in being for such a purpose as the present; the whole foundation for the argument, that such children were to be considered as in being for their own benefit only, rested upon some words which some reporters of decisions have ascribed to judges when delivering their opinions upon claims made by such children; but these words, if they were used in those cases, by no means negative the proposition, that such children were in being for all purposes; there was no reason for confining the rule; they were entitled to all the privileges of other persons, and it was reasonable they should be the means of conferring privileges upon other persons: but the law considered such children as in being, in cases in which they might be prejudiced; they might be vouched in a recovery, though such voucher was for the purpose of making them answerable over in value; they might be executors. Such a child had been considered in being for such a purpose as the present, in Long v. Blackall, which

was a complete decision on the very point. Supposing that the case of Long v. Blackall had not settled the point, the words in the testator's will, "born in due time afterwards," afforded a principle of construction sufficient to maintain the point. Those words must mean, in construction of law, as describing that period during which persons might come *in esse*, for whose lives, according to the law, the accumulation might go forward.

5th. With respect to the objection, that the words of restriction in the will, "as shall be living at the time of my decease, or born in due time afterwards," were, according to just construction, to be confined to the last class of persons, during whose lives the accumulation was to be; and could not, according to the rules of construction, be carried back to any of the preceding classes. It was submitted, that the clause of restriction could not be disconnected from all the descriptions of persons whose lives were specified. It was one sentence, and the qualification was applicable, and must be applied to the whole: strict grammatical construction was not the rule which governed in wills, if the intention of the testator required a different construction: and this sort of construction applied to all cases, whether the testamentary disposition were contrary to, or consistent with, what might be considered as worthy of favour, that the intention of the testator, if it were not inconsistent with the rules of law, was alone to be attended to. That it was impossible to read the clause in question, with a view to discover the real meaning of the testator, without being convinced that the testator meant to apply the restrictive words to all the members of the clause, that should require such restriction; the adding of the restriction after the

enumeration of the last class of persons, was not, because it was intended to apply to that only, but in order to avoid the frequent repetition of it.

6th. As to the objection, that the testator had exceeded the bounds prescribed by law for the suspense of property, in the clause by which he directed the property to be invested in the funds, until such purchases could be found, if such objection was now to be repeated, the answer was, that such was the case in every will, where there was a direction to lay out the accumulating fund of principal and interest in lands. It was always in this way that, until the purchase could be made, the money was to be accumulated, where an accumulating fund was to be made the ground of purchase, the interest and dividends, until the purchase was made, were never directed to be paid to the person who would be entitled to the rents and profits of the lands to be purchased.

The following questions were put to the Judges:—

1st. A testator, by his will, being seised in fee of the real estate therein mentioned, made the following devise:—"I give and devise all my manors, messuages, tenements, and hereditaments, at Brodsworth, in the county of York, after the death of my sons Peter Isaac Thellusson, George Woodford Thellusson, and Charles Thellusson, and of my grandson John Thellusson, son of my said son Peter Isaac Thellusson, and of such other sons as my said son Peter Isaac Thellusson now has or may have, and of such issue as my said grandson John Thellusson may have, and of such issue as any other sons of my said son Peter Isaac Thellusson may have, and of such sons as my said sons George Woodford Thellusson and Charles Thellusson may have, as shall

be living at the time of my decease, or born in due time afterwards; and after the deaths of the survivors and survivor of the several persons aforesaid, to such person as, at the time of the death of the survivor of the said several persons, shall then be the eldest male lineal descendant of my son Peter Isaac Thellusson, and his heirs for ever." At the time of the testator's death, there were seven persons actually born, answering the description mentioned in the testator's will: and there were two *in ventre sa mere*, answering the description, if children *in ventre sa mere* do answer that description. All the said several persons, so described in the testator's will, being dead; and, at the death of the survivor of such several persons, there being living one male lineal descendant of the testator's son Peter Isaac Thellusson, and one only: Is such person entitled by law, under the legal effect of the devise above stated, and the legal construction of the several words in which the same is expressed, to the said manors, messuages, tenements, and hereditaments at Brodsworth?

2d. If, at the death of the survivor of such several persons as aforesaid, such only male lineal descendant was not actually born, but was *in ventre sa mere*, would such lineal descendant, when actually born, be so entitled?

The Lord Chief Baron of the Court of Exchequer delivered their unanimous opinion upon the said questions in the affirmative.

The following is a note of his Lordship's speech on that occasion.

The first objection to the will is, that the testator has exceeded that portion of time within which the contingency must happen, upon which an executory

devise is permitted to be limited by the rules of law, for three reasons. First, Because that so great a number of lives cannot be taken, as in the present instance, to protract the time during which the vesting is suspended; and, consequently, the power of alienation suspended. Secondly, That the testator has added to the lives of persons who should be born at the time of his death, the lives of persons who might not. Thirdly, That after enumerating different classes of lives, during the continuance of which the vesting is suspended, the testator has concluded with these restrictive words, "as shall be living at my decease, or born in due time afterwards:" that, as these words appertain only to the last class in the enumeration, the words which are used in the preceding classes being unrestricted, they will extend to grandchildren and great-grandchildren, and so make this executory devise void in its creation, as being too remote. With respect to the first ground, *viz.* the number of lives taken, which in the present instance is nine, I apprehend that no case or *dictum* has drawn any line, as to this point, which a testator is forbidden to pass. On the contrary, in the cases in which this subject has been considered, by the ablest Judges, they have for a great length of time expressed themselves as to the number of lives, not merely without any qualification or circumspection, but have treated the number of existing lives as a matter of no moment; the ground of that opinion being, that no public inconvenience can arise from a suspension of the vesting, and thereby placing land out of circulation, during any one life; and that, in fact, the life of the survivor of many persons named or described is but the life of some one. This was held, without dissent, by

Twisden in Love v. Wyndham, 1 Mod. 50., 20 years before the determination of the Duke of Norfolk's case, who says, that the devise of a term may be for 20 lives, one after another, if all be in existence at once. By this expression he must be understood to mean any number of lives, the extinction of which could be proved without difficulty. When this subject of executory trusts came to be examined by the great powers of Lord Nottingham, as to the time within which the contingency must happen, he thus expresses himself:—"If a term be devised, or the trust of a term limited, to one for life, with 20 remainders for life successively, and all the persons are in existence and alive at the time of the limitation of their estates, these, though they look like a possibility upon a possibility, are all good, because they produce no inconvenience; they wear out in a little time." With an easy interpretation, we find, from Lord Nottingham, what that tendency to a perpetuity is, which the policy of the law has considered as a public inconvenience; namely, where an executory devise would have the effect of making lands unalienable beyond the time which is allowed in legal limitations, that is, beyond the time at which one remainder-man would attain his age of 21, if he were not born when the limitations were executed; when he declares, that he will stop where he finds an inconvenience, he cannot, consistently with a second construction of the context, be understood to mean, where Judges arbitrarily imagine they perceive an inconvenience; for he has himself stated where inconvenience begins, namely, by an attempt to supersede the vesting longer than can be done by legal limitations. I understood him to mean that, wherever courts perceive that such would be the effect,

whatever may be the mode attempted, that effect must be prevented; and he gives the same, but no greater latitude, to executory devises and executory trust as to estates tail. This has been ever since adopted; in Scatterwood v. Edge, 1 Salk. 229., the court held, that an executory estate, to arise within the compass of a reasonable time, is good; as 20 or 30 years, so is the compass of a life or lives: for, let the lives be never so many, there must be a survivor, and so it is but the length of that life. In Humberston v. Humberston, 1 P. Wms. 332., where an attempt was made to create a vast number of estates for life in succession, as well to persons unborn as to persons in existence; Lord Cowper restrained that devise within the limits assigned to common law conveyances, by giving estates for life to all those who were living (at the death of the testator), and estates tail to those who were unborn; considering all the co-existing lives, (a vast many in number), as amounting in the end to no more than one life. His Lordship was in the situation, attended to by Lord Nottingham, where a visible inconvenience appeared. The bounds, prescribed to limitations in common law conveyances, were exceeded: the excess was cut off; and the devise confined within those limits. Lord Hardwicke repeats the same doctrine in Sheffield v. Lord Orrery, 3 Atk. 282.; using the words "*life*" or "*lives*," without any restriction as to number. Many other cases might be cited to the like effect: but I shall only add what is laid down in two very modern cases. In Gurnell v. Wood, Lord Chief Justice Willes speaks of a life or lives, without any qualification: and Lord Thurlow, in Robinson v. Hardcastle, says, that a man may appoint 100 or 1000 trustees; and that the

ante, § 52.

survivor of them shall appoint a life estate. It appears, then, that the co-existing lives, at the expiration of which the contingency must happen, are not confined to any definite number. But it is asked, shall lands be rendered unalienable during the lives of all the individuals, who compose very large societies or bodies of men, or whose other very extensive descriptions are made use of? It may be answered, that when such cases occur, they will, according to their respective circumstances, be put to the usual test, whether they will or will not tend to a perpetuity, by rendering it almost, if not quite impracticable, to ascertain the extinction of the lives described; and will be supported or avoided accordingly.

But it is contended, that, in these, and other cases, the persons during whose lives the suspension was to continue, were persons immediately connected with, or immediately leading to, the person in whom the property was first to vest, when the suspension should be at an end. I am unable to find any authority for considering this as a *sine qua non* in the creation of a good executory trust. It is true that this will almost always be the case and mode of disposing of property, introduced and encouraged, up to a certain extent, for the convenience of families; which, in almost all instances, look to the existing members of the family of the testator, and its connections. But when the true reason for circumscribing the period, during which alienation may be suspended, is adverted to, there seems to be no ground or principle, that renders such an ingredient necessary. The principle is, the avoiding of a public loss, by placing property for too great a length of time out of commerce. The length of time will not be the greater or less, whether the lives taken have any interest vested or contingent, or have not;

nor whether the lives are those of persons immediately connected with, or immediately leading to, that person in whom the property is first to vest; terms, to which it is difficult to annex any precise meaning. The policy of the law can no way be affected by those circumstances; which, I apprehend, look merely to duration of time. This could not be the opinion of Lord Thurlow, in Robinson v. Hardcastle; nor is any such opinion to be found in any case, or book, upon this subject. The result of all the cases upon this
Rep. 215. point is thus summed up by Lord Chief Justice Willes, with his usual accuracy and perspicuity: "Executory devises have not been considered as mere possibilities, but as certain interests and estates, and have been resembled to contingent remainders in all other respects, only they have been put under some restraints, to prevent perpetuities. As at first it was held, that the contingency must happen within the compass of a life or lives in being, or a reasonable number of years, at length it was extended a little farther, namely, to a child *in ventre sa mere*, at the time of the father's death; because, as that contingency must necessarily happen within less than nine months after the death of a person in being, that construction would introduce no inconvenience: and the rule has, in many instances, been extended to 21 years after the death of a person in being; as, in that case likewise, there is no danger of a perpetuity." Comparing what the testator has done in the present case with what is above cited, it will appear, that he has not postponed the vesting even so long as he might have done.

The second objection which has been made in this case is, that the testator has added to the lives of persons, in being at the time of his decease, those of

persons not then born. It becomes, therefore, necessary to discover, in what sense the testator meant to use the words "born in due time afterwards." Such words, in the case of a man's own children, mean the time of gestation: what is to be intended by these words in this will, must be collected from the will itself. It may be collected from the will itself, that, by those words, the testator meant to describe the period of time, within which issue might be born, during whose lives the trust might legally continue; or, in other words, whom the law would consider as born at the time of his decease. Now, these could only be such children of the several persons named, as their respective mothers were *ensient* with, at the time of his death. Or he may have meant to use the word *born*, as denoting that period of time, which would be the necessary period for effecting his purpose. This is probable, from his using the same words as applied to the time, during which the presentation to the advowson of Mar might be suspended, without incurring a lapse. That a child *in ventre sa mere* was considered in existence, so as to be capable of taking by executory devise, was maintained by Powell in the case of Loddington v. Kyme, 1 Ld. Ray. 203., upon the ground, that the space of time between the death of the father, and the birth of the posthumous son, was so short, that no inconvenience could ensue. So, in Northey v. Strange, 1 P. Wms. 340., Sir John Trevor held that, by a devise to children and grandchildren, an unborn grandchild should take. Two years after, Lord Macclesfield, in Burdett v. Hopegood, 1 P. Wms. 486., held that, where the devise was to a cousin, if the testator should leave no son at the time of his death, a posthumous son should take, as being left at the testator's death. In Wallis

v. Hodgson, 2 Atk. 117., Lord Hardwicke held, that a posthumous child was entitled under the statute of distribution and his reason deserves notice. "The principal reason," says he, "that I go upon, is, that the plaintiff was *in ventre sa mere* at the time of her brother's death, and, consequently, a person *in rerum naturâ*; so that, by the rules of the common and civil law, she was to all intents and purposes a child, as much as if born in the father's lifetime." Such a child, in charging for the portions of other children living at the death of the father, is included as then living; Beale v. Doe, 1 P. Wms. 244.; and so in a variety of other reports. In Basset v. Basset, Lord Hardwicke decreed rents and profits, which had accrued at the rent day preceding his birth, to a posthumous child: and, since the statute 10 and 11 Wm. III., such children seem to be considered in all cases of devise, and marriage or other settlement, to be living at the death of their father, although not born till after his decease. It is otherwise considered in the case of descent. In Doe v. Quartley, 1 T. R. 634., the devise was to Hester Read for life, daughter of Walter Read, and to the heirs of her body, and, for default of such issue, to such child as the wife of Walter Read is now *ensient* with, and the heirs of the body of such child; then to the right heirs of Walter Read and Mary his wife. It was contended, that the last limitation was too remote, as coming after a devise to one not in being, and his issue. But the Court said, that, since the statute of King William, which puts posthumous children on the same footing with children born in the lifetime of their ancestor, this objection seemed to be removed, whatever was the case before. In Gulliver v. Wickett, 1 Wils. 105., the devise was to the wife for life, then

to the child with which she was supposed to be *ensient*, in fee, provided that, if such child should die before 21, leaving no issue, the reversion should go to other persons named. The Court said, if there had been no devise to the wife for life, which made the ulterior estate a contingent remainder, the devise to the child *in ventre sa mere*, being *in futuro*, would have been a good executory devise. In Lancashire v. Doe, 5 Term R. 49., the Court of King's Bench has held, that marriage and the birth of a posthumous child revoke a will, in like manner as if the child had been born in the lifetime of the father. In Doe v. Clarke, Lord Chief Justice Eyre holds that, independently of intention, an infant *in ventre sa mere*, by the course and order of nature, is then living, and comes clearly within the description of children living at the parent's decease: and he professes not to accede to the distinction between the cases, in which a provision has been made for children generally, and where the testator has been supposed to mark a personal affection for children, who happened to have been actually born at the time of his death. The most recent case is that of Long v. Blackall; the Court of B. R. had no doubt that a devise to a child *in ventre sa mere*, in the first instance, was good; and a limitation over was good also, on the contingency of there being no issue male, or descendant of issue male, living at the death of such posthumous child. It seems then, that, if estates for life had been given to the several *cestuis que vie* in this will, and, after their deaths, to their children, either born or *in ventre sa mere* at the testator's death, they would have been good. No tendency to perpetuity, then, can arise in the case of such lives being taken, not to confer on them a measure of the beneficial interest, but to fix

the time during which the vesting of the property, which is the subject of this devise, shall be protracted; inasmuch, as the circulation of real property is no more fettered in the one case, than in the other. It is, however, observable that this question may never arise, if it shall so happen that the children, *in ventre matris* at the death of the testator, shall not survive those who were then born.

The third ground of objection depends upon the application of the restrictive words, which are added to the enumeration of the different classes of persons during whose lives the restriction is suspended. This objection, I conceive, will be removed by the application of the usual rules in construing wills to the present case. First, where the intention of the testator is clear, and is consistent with the rules of law, that shall prevail. His intention evidently was, to prevent alienation, as long as by law he could: if, then, it is to be supposed, that the restrictive words are to be confined to the last of seven different descriptions, and that the testator intended to leave the four descriptions of persons, which immediately preceded this seventh class, without the benefit of such restriction, although they stand in need of it, we must do violence to all established rules on this head. That construction is to be adopted, which will support the general intent. The grammatical rule, of referring qualifying words to the last of the antecedents, is not even supposed by grammarians themselves to apply, when the general intent of a writer or speaker would be defeated by such a confined application of them. Reason and common sense revolt at the idea of overlooking the plain intent, which is disclosed in the context; namely, that they should be applicable to such classes as require them; and, as to the others,

to consider them as surplusage: if words will admit of more constructions than one, that which will support the legal intention of the testator, is, in all cases, to be adopted.

I do not trouble your Lordships with any observation upon the objections arising from the magnitude of the property in question, either as it now stands or may hereafter stand; or as to the motives which may have influenced this testator, nor his neglect of those considerations by which I, or any other individual, may or ought to have been moved: that would be to suppose, that such topics can in any way affect the judicious mind. For these imperfect reasons, I concur with the rest of the Judges in offering this answer to your Lordships first question.

As to the second question, the objection to such child being entitled, must arise from an allowance having been made for the time of gestation, at the end of the executory trusts: it seems to be settled, that an estate may be limited in the first instance to a child unborn; and, I apprehend, to the first and other sons in fee, as purchasers. The case of Long v. Blackall seems to have decided, that an infant *in ventre matris* is a life in being. The established length of time, during which the vesting may be suspended, is a life or lives in being, the period of gestation, and the infancy of such posthumous child. If, then, this time has been allowed, in some cases at the beginning, and in others, at the termination of the suspension; and if such children are considered, by the construction of the statute 10 & 11 Wil. III., as being born to such purposes; what should prevent the period of gestation from being allowed, both at the commencement and at the termination of the suspension, if called for? In those cases where it has been allowed

at the commencement, and particularly in Long v. Blackall, it must have been obvious to the Court, that it might be wanting at the termination: yet that was never made an objection. In Gulliver v. Wickett, the child, which was supposed to be *in ventre sa mere*, might have married and died before 21, and left his wife *ensient*: in that case, a double allowance would have been required; yet that possibility was never made an objection, although it was obvious. In Long v. Blackall, according to the printed report, the precise point was not gone into; but it is plain that the attention of the Court must have been drawn to it: for the learned Judge, who argued that case in support of the devise, expressly stated, "that every common case of a limitation over, after a devise for a life in being, with remainder in trust to his unborn issue, includes the same contingency as was then in question: for the heir for life may die, leaving his wife *ensient;* and the only difference is, that the period of gestation occurs at the beginning, instead of the end, of the first legal estate." It must have been palpable, that it might possibly occur at both ends. Every reason, then, for allowing the period of gestation in the one case, seems to apply with equal force to the other, and leads the mind to this conclusion, that it ought to be allowed in both cases, or in neither case. But, natural justice having, in several cases, considered children *in ventre matris* as living at the death of the father, it should seem that no distinction can properly be made; but that, in the singular event of both periods being required, they should be allowed, as there can be no tendency to a perpetuity.

After the opinion of the Judges had been delivered, the Lord Chancellor addressed the House as follows:

The learned Judges having given their opinion upon the points of law referred to them, there is nothing remaining for the consideration of the House, except one question, which could not be referred to the Judges. This cause was decided in the Court of Chancery by Lord Rosslyn, with the assistance of Lord Alvanley, Mr. Justice Buller, and Mr. Justice Lawrence; and I believe that I speak in the hearing of those who know, that the late Lord Kenyon could hardly be brought to consider these questions as fit to be argued, thinking it dangerous, after what had been settled with respect to executory devises, to allow so much consideration to be given to them. His opinion upon the subject was never doubted. In the case of Robinson v. Hardcastle, it is laid down as unquestionably competent to a testator to give the power of appointing a life estate to the survivor of a thousand persons, to begin at the decease of such survivor. Your Lordships, therefore, have the concurrent testimony of all the learned persons to whom I have alluded, as well as of the learned Judges whose unanimous opinion has been delivered this day, upon this great case. Not great indeed on account of the questions which it involves, or of any thing of which, as Judges, we can take notice, since the decision must be the same, whether the property in question be one hundred pounds, or seven hundred thousand pounds *per annum*. If it were allowable to entertain a wish upon the subject, perhaps we might all concur; but we are only to consider, whether there be any thing in this will to render it illegal. When it was said that an attempt to tie up property for nine lives was illegal, I thought that such a proposition could not be supported; for the length of time does not depend upon the number, but on the

nature of the lives; if we are to argue on probabilities, two lives may last longer than nine or ten. If, in the year 1796, estates had been devised to accumulate during the lives of so many of the members of this house as have died since that time, it might have been argued, that the property was tied up for 20 or 30 lives: and yet this number of lives has worn out in a very short period. The question, therefore, cannot turn upon the magnitude of the property, or the number of the lives. The question is, whether there be any rule of law which prescribes a period for which property may be unalienable? Now, the language of all the cases is this, that property may be so limited as to make it unalienable during any number of lives. I know no other rule but that. Such being the law, there is another question arising upon this will, which is a pure question of equity, whether a testator can direct the rents and profits to be accumulated during that period for which he may so make the property unalienable? That he may do so, I take to be most clear. In truth, I speak in the hearing of those who will assent to me when I say, that if the testator had given the residue of his personal estate to such person as should be the eldest male descendant of Peter Isaac Thellusson at the death of the survivor of all the lives, without more, that simple bequest would direct an accumulation, until it should be seen what person answered the description of that male descendant; and the effect of the common rules of law would have supplied the rest. The course of proceeding would have been, to inquire, whether the executory devise of the personal estate to such future individual were good; and, if it were good, then, wherever the residue was given, the interests and profits would go likewise. There can be no more objection to such person taking the interest, than the capital itself.

Suppose the nine persons during whose lives this property is tied up had been lunatics, the interest and profits would be accumulated without any direction. Nor does the policy of the law, which respects perpetuities, apply to the case of accumulation: the rents and profits are not locked up, but are constantly invested, and the fund is kept in a course of constant circulation. If, then, the fruits of the property are kept in constant circulation, while the property is limited, what objection can there be to accumulation? I remember, in the case of Mrs. Buckley's will, where the testatrix had given property to such son of her infant daughter as should first attain the age of 21, Lord Kenyon, then Master of the Rolls, directed the whole profits to accumulate during that period, taking the rule to be quite clear, that, so long as the property was unalienable, he might direct the rents and profits to accumulate. And I speak with great sincerity when I say, that I never could entertain the least doubt upon the subject. If we lay aside all the cases which have occurred since the act of the 39 & 40 Geo. III., there is nothing to impeach it. That act was rather a matter of surprise upon me; and, perhaps, it is not one of the wisest legislative measures: it must be remembered, that it expressly alters what it takes to have been the former law, and confines the power of accumulation to 21 years. But if your Lordships were to exercise the power of accumulation in all the cases allowed by the act, the accumulation would be enormous. It did not occur to those who penned the act of 39 & 40 Geo. III., that if this very will had been made subsequent to the passing of that act, the accumulation directed by the will would have gone on for 21 years. The Court of Chancery has decided, that

infra, § 58.

Griffiths v. Vere, infra, § 60.

if a person makes such a disposition of his property that it may be unalienable for a longer period than is allowed by the act, such disposition is only void for so much as exceeds the term of 21 years, leaving it good for the rest of the term. The only points which have ever appeared to me to bear an argument, have been those upon the critical meaning of the words, "as shall be living at the time of my decease;" and the words, "or born in due time afterwards;" which follow the description of the persons during whose lives the property is tied up. If, from any disinclination to give effect to the will, your Lordships were to construe the former words as referring to the last description of persons only, that disinclination would be gratified at the expence of overturning all the rules of construction which have been settled for ages; and even if your Lordships should feel inclined to give any relief by legislative interference, which would be very bold, I am quite sure that you will not be so bold as to give a wrong judgment in point of law.

With respect to the other point, viz. "born in due time afterwards," I observe, that, according to the printed report, one of the Judges held, that these words must refer to a child *in ventre sa mere*; and the others, that they amounted to a declaration of the testator's will, that the property should be unalienable and accumulate during the lives of all the persons, born or unborn, whom the law authorized him to take as lives. In my opinion, either of these constructions may be taken to be the true meaning, agreeably to the rules of law; but I must add, that, according to the rules of law, the House must put such a construction upon the words, as will support the testator's intention; it is, therefore, quite beside the

question, to argue what child should take, because the testator is describing the lives of persons, in order to define the period of time during which the power of alienation is to be suspended, and the accumulation is to go on. But, if it were necessary, I should have no difficulty, as a lawyer, in stating to the House, that I think the rule of law has been rightly laid down, that the period of gestation is to be taken at the beginning and the end. In Gulliver v. Wickett, the devise was to a child of whom the mother was *ensient*, with a proviso, that the property should go over, if that child should die under 21 without issue; and in the construction of that devise, it was laid down, that the devise extended to the child *in ventre sa mere*; and that, if the child to whom it was given had attained 20 years of age, and married, and died leaving his wife *ensient*, it could not be said that the property was not vested. In the case of Long v. Blackall, I thought it my duty, as counsel, to submit to the consideration of the Chancellor such points as occurred to me in support of the interest of my client, and urged, that the allowance for the time of gestation was made at both ends, I thought that the point was not treated with the respect that it deserved. The Chancellor sent the case to the Court of King's Bench, but the point was not made; and when I pressed the Chancellor to send it there again, his answer was, that he was very much ashamed of ever having sent it there, and that he would not send it again. I know that Lord Kenyon's opinion was quite clear upon the subject, as well as those of Mr. Justice Buller, and Mr. Justice Lawrence. This, therefore, is a case, in which the legal doctrine is clear; and, whatever may be our regret upon the subject, is it not our duty to deter-

mine according to law? When I put the question, whether this decree shall be reversed, I shall think myself bound to say, that I think it ought to be affirmed.

The decree was affirmed.

Hargrave Jur. Exerc. vol. 1. 307.

58. By the statute 39 & 40 Geo. III. c. 98. it is enacted, "that no person or persons shall, after the passing of that act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property so and in such manner that the rents, issues, profits, or produce thereof, shall be wholly or partially accumulated for any longer term than for the live or lives of any such grantor or grantors, settler or settlers, or the term of 21 years from the death of any such grantor, settlor, devisor, or testator, or during the minority or respective minorities of any person or persons who shall be living or in *ventre sa mere* at the time of the death of such grantor, devisor, or testator, or during the minority or respective minorities only of any person or persons, who, under the uses or trusts of the deed, surrender, will, or other assurances directing such accumulations, would for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce, so directed to be accumulated. And in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void; and the rents, issues, profits, and produce of such property so directed to be accumulated, shall, so long as the same shall be directed to accumulate contrary to the provisions of this act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed.

"Provided always, that nothing in that act contained should extend to any provision for payment of debts of any grantor, settlor, or devisor, or other person or persons, or to any provision for raising portions for any child or children of any person taking any interest under any such conveyance, settlement, or devise, or to any direction touching the produce of timber or wood upon any lands or tenements; but that all such provisions and directions shall and may be made and given as if the act had not passed."

59. Although a trust of accumulation created by will during the continuance of a life, is void under this statute, yet such trust will be supported by the Court of Chancery during the time allowed by the act, namely, 21 years.

60. Charlotte Mathews devised all her real estates to trustees, upon trust to sell, and gave all her personal estate to the said trustees, upon trust to invest the monies to arise from the sale of her real estates, and her personal estate, in the public funds, upon trust to pay the dividends to her sisters Elizabeth Mary Griffiths and Martha Vere, during their joint lives, in equal proportions; and after the decease of either of them, the whole to the survivor during her life. Provided, and she declared her will, that so much of the said dividends as should accrue due to Elizabeth Mary Griffiths during the life of John Griffiths her husband, should not during that time be paid to her; but the same should be, during his life, invested by the trustees in the public funds, and that the dividends or interest which should accrue thereon, should be added to and accumulate with the capital; and upon the decease of the said John Griffiths, the said capital, with the accumulation thereof, should be forthwith paid to Elizabeth Mary Griffiths.

Griffiths v. Vere, 9 Ves. Jun. 127.

Under a bill by Mrs. Griffiths and her husband, the accounts having been directed against the trustees, who were also executors, a petition was presented by Mr. and Mrs. Griffiths, praying a declaration, that the proviso directing accumulation was contrary to the statute 39 & 40 Geo. III. c. 98., and therefore null and void; and that the petitioners were entitled to have full benefit of the will, as if such clause had not been inserted.

A petition for the same purpose had been presented to the Master of the Rolls, and dismissed.

In support of the petition, it was argued, that the meaning of the act was, that the whole attempt against which it was directed, should be void: it could not, therefore, be good for a given time, the Legislature having intimated nothing to that effect. A direction to accumulate for a life, was a direction to accumulate for more than 21 years, a life estate being larger than an estate for years. The value of the life was of no importance, and the Court would not inquire into that. This act was to be construed by analogy to the law of executory devises, which were allowed only within certain limits. As the accumulation might, by possibility, last longer than 21 years, the disposition was void, as a limitation over of personal property, after a disposition to a man and the heirs of his body, was void; without regard to the possible event that they might be extinct within the period allowed by law. If the accumulation should, under the direction in the will, continue beyond the 21 years, what was to become of that which was accumulated after that period, and of the interest of the previous accumulation?

Against the petition, it was contended, that this case arose upon a statute restraining the legal right to dispose of property. Upon the construction of

the act, it clearly was not intended to prevent accumulation in any case, after the death of the party, to the period of 21 years; and though an attempt was made to go beyond that, the purpose should be good to that extent, in whatever form it was directed; for no precise form of directing accumulation was prescribed, nor could that be intended; but it was sufficient, whatever the form, that it was not to exceed the period of 21 years. The direction that, so far as accumulation was directed contrary to the act, it should be void, applied only to the excess. There would be certainly some difficulty, in the event of the parties living beyond the period of 21 years, to determine what should become of the excess. But, if Mrs. Griffiths survived that period, she would be entitled to the accumulation, provided she survived her husband, to whose death it was confined; and it was possible that he might live only two or three years.

Lord Eldon said, the question turned on the will and the act of parliament. He understood a petition to the same effect was presented to the Master of the Rolls, insisting that, by the will, accumulation was prescribed beyond what was allowed by the act, and therefore the direction was wholly void; and that then Mrs. Griffiths' husband was, within the terms of the act, entitled to the rents and profits, as if no such clause for accumulation was in the will. And the Master of the Rolls was of opinion, that, upon the true construction of the act, the accumulation directed during the life of the husband, if not in fact going beyond 21 years, was good; and if it did in fact continue beyond that period, yet, upon the true construction of the act, the direction was good *pro tanto;* and during the period of 21 years, the rents and profits were well directed to accumulate, leaving it to the law to determine what was to be-

come of the rents and profits to accrue between the end of the 21 years, and the expiration of the life; and, of course, to determine also what was to become of the interest of the fund created by the accumulation permitted for the period of 21 years.

The sort of case now before him was not, he believed, much in the contemplation of the legislature. It was material to attend to every word of the act, for the language was not very similar to any other act with either enabling or restraining clauses. The phrase, "partial accumulation," was rather expressive of the effect than of direction; but, considering the subsequent part, it must be construed what should be directed to be accumulated. If the act stopped at the declaration that it should be null and void, the estate in the meantime would be considered as not given, unless falling into the residuary devise; and therefore the rents and profits undisposed of must have gone to the heir. But the question was, whether the following words were not so explanatory of the former, as to show in what sense the legislature used the words declaring that it should be null and void; and whether, taking the whole clause together, it was not meant only as far as by the subsequent words it was directed to be so considered? The words "so long" admitted two constructions; one, so long as the same, by the effect of the direction in the will, should be capable of being accumulated beyond 21 years from the death; the other, so long as the same should be directed to be accumulated contrary to the provisions of the act: the accumulation being understood to be contrary to the act, if directed by the will for more than 21 years. It was obvious that many cases upon the old law of executory devise and accumulation were not in any manner provided for by this act: he doubted

whether the present case was thought of; for, by this will, the estate was given, not by executory devise, but by creating a trust to pay the annual profits, and then followed the direction for accumulation. If that direction was struck out, it was contended that the effect was not, as in other cases, that those profits would be undisposed of, but that it must be considered a gift *in præsenti;* and that the clause for accumulation did not prejudice their immediately entering into the enjoyment. If it was necessary to decide that question, a good deal was to be said upon it; and it was not clear upon this will that it could necessarily be made out that there was a gift *in præsenti*, if this direction was struck out of the will, for the whole must be taken together. But, supposing it not struck out, was the direction void altogether, because it was not a direction for accumulation during 21 years or less, but which might happen to operate during a period that might last longer, admitting also that it might operate as a direction for less in effect? The point was doubtful; but, upon the whole, that construction which had been put upon the act was the right one; and he was the rather led to that, by the concurrence of opinion among those to whose assistance he had resorted upon the first construction of an act of so much importance, who all agreed, that this was the proper construction. Under these circumstances, finding the Master of the Rolls' opinion to be such as he had stated, and that it had the concurrence of those whom he had consulted, it would be enough for him, if it was only the inclination of his opinion, to say this was the right construction.

Longdon v. Simpson, 12 Ves. 295.

Fearne's Cont. Rem. 538. 6th edit.

The petition was dismissed.

61. It has been determined by Sir W. Grant, that a trust of a term, during the minorities of tenants

for life, or in tail, to receive and lay out the rents in stock, to accumulate for the benefit of the persons who should, upon the expiration of such minorities or death of the minors, become entitled to the rents and of the age of 21, was too remote; and being void in its creation, was incapable of modification, so as to establish it to the extent to which it might have been originally carried.

Southampton v. Hertford, 2 Ves. and Bea. 54.

62. The trust of a term of 1000 years created by a settlement was declared to be,—That during the minority or minorities of the persons who for the time being should, under the limitations in the settlement, be immediate tenants for life, in tail male, or in tail, in possession, or actually entitled to the rents; the trustees should lay out the rents, after payment of certain incumbrances, in the public funds, to accumulate, and to stand possessed of such funds and the accumulation of the dividends in trust for such person or persons as should, immediately upon the expiration of such minority or minorities or deaths of such minors, be tenants in possession, or entitled to the rents, and be of the age of 21 years.

The bill contended, that the direction for the accumulation of the rents and profits during minority, until there should be a tenant in possession of the age of 21 years, was illegal and void; and that therefore the plaintiff, as tenant in tail, was entitled to all the estates, and to all the rents which should remain after discharging the incumbrances. It was argued for the plaintiff, that the question was, whether the direction to accumulate the rents during the successive minorities of tenants for life, or in tail, until there should be some tenant in tail adult to whom the whole accumulation was to be paid, was not too remote; as it might possibly endure much longer than the allowed limits. It might happen, though

not probable, that this accumulation would go beyond a century; if, for instance, the then tenant for life, who was a minor, should marry and die under age, leaving a minor, who might do the same. In Griffiths v. Vere, Lord Eldon laid it down as well settled, that the possibility that an executory devise might fall within the legal limits, would not support it. This trust of accumulation therefore, not being within the act 39 & 40 Geo. III., must fall.

ante, § 60.

ante, § 58.

On the other side it was said, that the direction for accumulation did not necessarily include a longer period than the law allowed; and might fall within those limits. It was not a plain direct transgression of the law; as the limitation in Lade v. Holford, looking to a period of twenty-six years. That accumulation might proceed as long as the estate might be made unalienable, was admitted in the case on Mr. Thellusson's will. All the consequences represented as flowing from this accumulation might happen upon any limitations in tail; a series of successive minorities preventing alienation. If however this trust went too far, it was void only for the excess, if capable of being clearly distinguished. It was valid, therefore, at least until a tenant in tail attained the age of twenty-one.

ante, c. 9. § 38.

ante, § 57.

Sir W. Grant said, it was admitted on all sides in the case upon Mr. Thellusson's will, that a trust of accumulation could not exceed the limits of executory devise. It was on one side strenuously contended that it could not go so far; but it was decided, that so long as an estate may be kept from vesting, so long accumulation may be directed. An estate may be kept from vesting until an unborn child of a person in being attains the age of 21: but an estate could not be limited so as to vest only in the first descendant of a person in being who might attain

21; as that descendant might be a child of an unborn child, or a person more remote; and the period therefore much beyond the allowed limits. That was the direction as to the continuance of this accumulation, and the consequent suspension of vesting of the accumulated fund; as if there should be a succession of tenants for life, dying under 21, the accumulation would be to continue, and the accumulated fund to vest only in a person attaining that age, however remote the period. To that extent it was impossible to support it; whether it could be supported to any extent he should not determine till he saw the case of Phipps v. Kelynge in the Register's book.

A few days after, his Honour said he had examined that case, and found it was in substance as stated in the note to Fearne's Executory Devises: but he did not think it would be found to be an authority for the proposition that a trust for accumulation, exceeding the allowed limits, was void only for the excess. His opinion therefore was, that this trust was altogether void, except so far as it was a trust for payment of debts.

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